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No. 85-492

In the

Supreme Court of the United States.

OCTOBER TERM, 1985.

ROBERT T. DEVEREAUX, ET AL.,
PETITIONERS-APPELLANTS,

v.

WILLIAM J. GEARY, ET AL.,
RESPONDENTS-APPELLANTS,
AND
PLAINTIFF-CLASS IN *CULBREATH* v. *DUKAKIS*,
INTERVENORS-APPELLEES.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Questions Presented for Review.

I. Whether the "collateral attack" doctrine is consistent with the Constitution's due process guarantee?

II. Whether a consent judgment in an action brought under Title VII of the Civil Rights Act of 1964 is subject to the remedial limitations contained in Section 706(g) of Title VII?

III. Whether racial quotas for promotional positions in state service are permissible remedies under Section 706(g) of Title VII?

IV. Whether a voluntary affirmative action plan involving state action violates the Equal Protection Clause of the Fourteenth Amendment?

List of Parties to the Proceeding Below.

The plaintiffs-appellants below were Robert T. Devereaux, William E. Kelley, John J. Bakey, Donald I. Dentremont, Jr. and Daniel J. Gately, Sr.

The defendants-appellees were William J. Geary, Commissioner of the Metropolitan District Commission, and Thomas E. Keogh, Superintendent of Police of the Metropolitan District Commission.

The intervenor-appellee was the plaintiff class in *Culbreath* v. *Dukakis*, CA 74-2463 (D.Ma).

The instant writ is submitted on behalf of Robert T. Devereaux, William E. Kelley, John J. Bakey, Donald I. Dentremont, Jr. and Daniel J. Gately, Sr.

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Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Citations to Opinions Below.

The decision of the United States Court of Appeals for the First Circuit is reported at 765 F.2d 268 (1st Cir. 1985), and is reproduced in Appendix A of this petition.

The memorandum and order of the United States District Court for the District of Massachusetts is reported at 596 F. Supp. 1481 (1984), and is reproduced in Appendix B of this petition.

Jurisdictional Statement.

The judgment of the United States Court of Appeals for the First Circuit was entered on June 24, 1985. This Court has jurisdiction over the instant petition pursuant to 29 U.S.C. § 1254(1).

Applicable Statutory Provisions.

The issues presented by the instant petition include whether an individual's Fourteenth Amendment equal protection rights may be overridden by a consent decree, entered pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2002e *et seq.*, that establishes racial quotas for promotional appointments within a state police force. More specifically, the instant petition raises the issue of whether Section 706(g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2002e-5(g), authorizes a federal court to enter a consent judgment that overrides state civil service law by establishing racial quotas for promotional positions within the state workforce.

The texts of Amendment XIV, Section 1 of the United States Constitution and Section 706(g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2002e-5(g), are set out in Appendix C of this petition.

Statement of the Case.

In 1974 certain minority employees of the Commonwealth of Massachusetts brought an action against state officials, *Culbreath* v. *Dukakis*, CA No. 74-2463, challenging alleged historical and ongoing discriminatory hiring and promotional practices in the state civil service. Thereafter, the suit was certified as a class action, but the claims of the class were never tried. Rather, the parties stipulated to the entry by the district court of a consent judgment which was itself based on a stipulation of facts that was prefaced by the following:

> The parties believe that the stipulation of facts set forth below and acknowledged by the Court constitute findings of such past practices of discrimination of both a judicial and administrative nature, sufficient to sustain an action under Title VII of the Civil Rights Act of 1964, thereby providing sufficient grounds for the remedies set forth in the Decree.[1]

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[1] The plaintiffs in *Culbreath* did not bring their action under Title VII but, rather, asserted claims under §§ 1981 and 1983 of Title 42. In this regard, the First Circuit noted as follows:

> The plaintiff class in *Culbreath* originally grounded its claims on 42 U.S.C. §§ 1981, 1983, not on Title VII. About two years into the litigation, however, the Supreme Court ruled in *Washington* v. *Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1979), that in section 1981 and section 1983 actions, plaintiffs must prove intentional discrimination to recover. Since the *Culbreath* complaint did not contain allegations of intentional discrimination, the parties in *Culbreath* treated the action as one brought pursuant to Title VII. For purposes of this appeal, it is clear that the *Culbreath* consent decree was entered under Title VII and must be reviewed accordingly. *See* note 2, *infra*.

765 F.2d at 270 n.1.

In reference to the filling of promotional positions in the state agencies, the parties, in the *Culbreath* consent decree, provided, in part, as follows:

> (a) Whenever an appointing authority defendant makes requisition to fill by permanent or temporary appointment one or more positions covered by this Decree, including promotions, the appointing authority defendants will request and the Personnel Administrator shall promptly certify, in addition to the names certified pursuant to Civil Service Rule 11, or its successor, the names of a like number of minority individuals who are on an eligible list for such positions, in order of their standing. Using the certified names, the appointing authority shall employ throughout each year of the Decree and in every grade grouping, a complement of minorities equal to that year's goal for permanent appointments as specified in Attachment A.
>
> (b) Each appointing authority defendant shall, using the certified names referred to above for temporary appointments, and using other appropriate names for provisional appointments and provisional promotional appointments, employ by non-permanent appointments throughout each year of the Decree and in every grade grouping, a complement of qualified minority persons equal to that year's goal for such non-permanent appointments, as specified in Attachment A.

Ultimately, the consent decree was approved by the district court and entered as an order.

As a result of a competitive examination held on April 23, 1983, an eligibility list was established for the promotional position of police captain in the Metropolitan District Commission (hereinafter, "the MDC"), an agency of the Commonwealth of Massachusetts. The petitioners herein, five white police lieutenants who are employed by the MDC, occupied positions 3 through 5 on that list.[2] At various times prior to June 1984, the two lieutenants who were 1 and 2 on the list were promoted to captain. In June 1984, the MDC filled a temporary captain's position that had been designated by the MDC as a minority position. As a result of this designation, the position was given to a minority candidate who was number 6 on the eligibility list and, as such, would not have been otherwise eligible under applicable state law[3] to be considered for the temporary captain's position. The temporary captain's position was designated as a minority position because of the operation of the *Culbreath* consent decree. As a result of being bypassed for the captain's position, the petitioners commenced the suit that underlies the instant petition. In their suit, the petitioners contended that the state defendants, by making race the determinative selection factor, had deprived the petitioners of their Fourteenth Amendment equal protection rights and violated 42 U.S.C. § 1981.

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[2] Petitioners Devereaux and Kelley tied for position number 3 on the list, while petitioners Bakey and Dentremont tied for position number 4 and petitioner Gately occupied position number 5. *See* note 3, *infra*.

[3] When one position that is covered by state civil service law is to be filled, the Personnel Administrator, pursuant to M.G.L. c. 31, § 27 and the rules of the Civil Service Commission, certifies the top three candidates on a promotional list to the appointing authority who is required, in the normal course, to select from one of the three to fill the vacancy. If the list contains ties, all candidates occupying the top three remaining slots on the list are certified for consideration. Accordingly, it is possible for the Court to find, with certainty, that, but for the terms of the *Culbreath* consent decree, one of the named petitioners herein would have been appointed to the disputed captain's position.

The district court considered the petitioner's suit to be an attempt to intervene in *Culbreath* rather than a collateral attack on the consent decree. *See* 596 F.Supp. 1481, 1483 (D.Ma. 1984). The First Circuit concurred with the district court's characterization of the petitioners' suit and concluded, as had the district court, that the analysis and holding in *Stotts* did not extend to the terms of the consent decree that established racial quotas for promotional appointments within the MDC police. As such, the First Circuit held that *Stotts* did not so change the law of Title VII as to constitute an "unusual circumstance" that would justify intervention. *See* 765 F.2d at 271.

Reasons for Allowing the Writ.

By their suit, the petitioners attempted to place in issue the permissible scope of district court orders under Section 706(g) of Title VII. Thus, stated simply, the state defendants herein defended their admittedly racially motivated action based on the terms of the *Culbreath* consent decree that had been entered as an order of the district court pursuant to the remedial provisions of Title VII and that, as noted *supra*, contained provisions establishing racial quotas for promotional police appointments within the MDC.

The First Circuit, however, considered the petitioners' suit to be an attempt to intervene in *Culbreath* and, in addition, chose to analogize the court adopted and enforced consent decree to the type of voluntary affirmative action plan at issue in *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979).[4] Having established this analytical framework, the First

[4] In its opinion, the First Circuit mischaracterized the petitioners' position. Thus, the Court stated that it was the petitioners' contention that "the clear impli-

Circuit went on to limit the Court's holding in *Firefighters Local Union No. 1784* v. *Stotts*, ___ U.S. ___, 104 S.Ct. 2576 (1984), to the specific facts of the case and, therefore, found that racial quotas governing appointments to promotional positions in state agencies remained permissible terms for a Title VII consent decree. In so ruling, the First Circuit acknowledged its uncertainty regarding the intended scope of *Stotts*,[5] but re-

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cation of the Court's language in *Stotts* outlaws the use of any race-conscious affirmative action plan." 765 F.2d at 274. This was not the case. Rather, the petitioners contended that a consent decree, being a remedial order of the court, must comport with the remedial authority granted to the court by the operative statute. Stated another way, it was the petitioners' contention that a court's remedial authority does not expand simply because its order is entered with the consent of the parties. Therefore, in regards to the instant case, the petitioners contended that the court's remedial authority under Section 706(g) of Title VII had been constricted by *Stotts* and that this constriction had to be reflected in the terms of the consent decree. *See id.* at 271 n.2.

[5] In this regard, the First Circuit stated as follows:

> Plaintiffs argue that although *Stotts* may be factually distinguishable, the clear implication of the Court's language in *Stotts* outlaws the use of any race-conscious affirmative action plan.
>
> We are not so sure. It is not easy to determine from the plurality opinion in *Stotts* just how far a majority of the Court would want to go in the present situation.
>
> . . .
>
> We recognize, of course, that this is a difficult and sensitive area in which we and the other circuit courts could be mistaken in our reading of current precedent. . . Unless we can say with greater certainty than is now possible that the decree, contrary to former assumptions, is invalid, it would seem better to leave it undisturbed, at least until the Supreme Court has shed more light in this area, which it quite possibly may do within the next term. *See Wygant* v. *Jackson Board of Education*, 746 F.2d 1152 (6th Cir. 1984), *cert. granted*, ___ U.S. ___, 105 S.Ct. 2015, 85 L.Ed.2d 298 (1985).

765 F.2d at 274-275 (footnote omitted).

solved that uncertainty in favor of racial quotas, relying, in large measure, on the absence of an expressed overrule of *United Steelworkers of America* v. *Weber*, by the Court in *Stotts*.[6]

The instant petition presents a number of issues, all of which have clear import beyond the facts of the instant dispute and any of which, standing alone, justify accepting the instant writ. First, the First Circuit's characterization of the petitioners' suit as an attempt to intervene in *Culbreath* followed from the Court's subsidiary conclusion that actions challenging practices allegedly authorized by a consent decree in another case are impermissable "collateral attacks" on the decree. There is now a conflict among the circuit courts of appeal regarding the propriety of the so-called "collateral attack doctrine". Particu-

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[6] With reference to the *Weber* issue, the First Circuit stated that —

> . . . the Court had earlier held in *United Steelworkers of America* v. *Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), that Title VII does not forbid private employers from voluntarily entering into affirmative action plans to eliminate manifest racial imbalances in employment categories. The expansive reading of *Stotts* urged by plaintiffs would require us to find that *Stotts* overruled *Weber sub silentio*. In view of the importance of any such action, it seems likely that the Court would have directly addressed *Weber* if it had intended to overrule that decision. All the circuits considering the issue have concluded, in the absence of any express pronouncement to the contrary, that *Weber* remains good law.

765 F.2d at 274-275 (footnote omitted), *citing EEOC* v. *Local 638*, 753 F.2d 1172, 1185-1186 (2d Cir. 1985); *Vanguards of Cleveland* v. *City of Cleveland*, 753 F.2d 479, 487-488 (6th Cir. 1985); *Diaz* v. *American Telephone & Telegraph*, 752 F.2d 1356, 1360 n.5 (9th Cir. 1985); *Van Aken* v. *Young*, 750 F.2d 43, 45 (6th Cir. 1984), *Wygant* v. *Jackson Board of Education*, 746 F.2d 1152, 1158 (6th Cir. 1984), *cert. granted*, 105 S.Ct. 2015 (1985); *Kromnick* v. *School District of Philadelphia*, 739 F.2d 894, 911 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 782 (1985); *Grann* v. *City of Madison*, 738 F.2d 786, 795 n.5 (7th Cir.), *cert. denied*, 105 S.Ct. 296 (1984).

larly in light of the due process implications of the application of the collateral attack doctrine, the Court should grant the instant writ to resolve the conflict among the circuits. Second, the First Circuit failed to distinguish the instant case, which arises out of a court entered and enforced consent decree and, as such, should involve the issue of the permissible scope of remedies under Section 706(g) of Title VII, from *United Steelworkers of America* v. *Weber*, wherein the Court considered whether the operation of a voluntary affirmative action plan, within the private sector, violated Title VII. The Court should grant the instant writ to address the issue of whether the remedial terms of a consent decree must conform to the statutory remedial limitations applicable in fully litigated cases. Third, the First Circuit, like a number of other circuit courts of appeal, read *Stotts* as disapproving only racial quotas that abrogate a bona fide seniority system protected under Section 703(h) of Title VII. The Court should grant the instant writ to give full import to the reasoning in and meaning of *Stotts*. Fourth, even if the Court concurs that the terms of a court enforced consent decree are not subject to the limitations on remedies under Section 706(g), the Court should grant the instant writ so that it may address one of the issues left open in *Weber*; that is, whether an affirmative action plan involving state action violates the Equal Protection Clause of the Fourteenth Amendment.

1. The Collateral Attack Doctrine Is Inconsistent With the Constitution's Due Process Guarantee.

In *Culbreath* v. *Dukakis*, 630 F.2d 15 (1st Cir. 1980), the First Circuit, in *dicta*, noted that an individual that is aggrieved by the effects of the operation of a consent decree could not commence an independent action, since a "[c]ollateral attack on the decree [would] be impossible because only the district court supervising implementation of the decree will have sub-

ject matter jurisdiction to modify the decree." *Id.* at 22. In treating the petitioners' suit as an attempt to intervene in *Culbreath* rather than as an independent action, the First Circuit reaffirmed and applied its collateral attack doctrine. Other circuit courts of appeal also have approved the dismissal, on jurisdictional grounds, of actions challenging practices authorized by consent decrees in other cases. *See Thaggard* v. *City of Jackson*, 687 F.2d 66, 68-69 (5th Cir. 1982), *cert. denied sub nom. Ashley* v. *City of Jackson*, 104 S.Ct. 225 (1983); *Dennison* v. *City of Los Angeles Department of Water & Power*, 658 F.2d 694, 695 (9th Cir. 1981); *Black & White Children of the Pontiac School System* v. *School District of the City of Pontiac*, 464 F.2d 1030, 1030-1031 (6th Cir. 1972) (*per curiam*); *Burns* v. *Board of School Commissioners of the City of Indianapolis*, 437 F.2d 1143, 1144 (7th Cir. 1971) (*per curiam*); *Prate* v. *Freedman*, 430 F. Supp. 1373, 1374-1375 (W.D.N.Y.), *aff'd without published opinion*, 573 F.2d 1294 (2d Cir. 1977), *cert. denied*, 436 U.S. 922 (1978); *O'Burn* v. *Shapp*, 70 F.R.D. 549, 552-553 (E.D.Pa.), *aff'd without published opinion*, 546 F.2d 418 (3d Cir. 1976), *cert. denied*, 430 U.S. 968 (1977).

However, in *United States* v. *Jefferson County*, 720 F.2d 1511 (11th Cir. 1983), the Eleventh Circuit rejected the collateral attack doctrine as inconsistent with the principles of res judicata and collateral estoppel which, it concluded, "apply to consent decrees as well as to ordinary judgments entered by a court." *Id.* at 1517. In this regard, the Eleventh Circuit stated as follows:

> The principles of res judicata and collateral estoppel apply to consent decrees as well as to ordinary judgments entered by a court. These doctrines prevent the attack of a prior judgment by parties to the proceedings or by those with sufficient identity of

> interests with such parties that their interests are deemed to have been litigated in those proceedings. A final judgment may not, however, bind a nonparty when his interests were not represented; thus, situations can arise where a judgment purporting to affect a nonparty must not be applied to him. There are, additionally, limitations on the extent to which a nonparty can undermine a prior judgment. A nonparty may not reopen the case and relitigate the merits anew; neither may he destroy the validity of the judgment between the parties.
>
> In applying these principles to consent decrees, some courts have raised a specter that any action having a burden, financial or otherwise, on a consent decree is an "impermissible collateral attack" on the decree. We do not follow this path to the extent that it deprives a nonparty to the decree of his day in court to assert the violation of his civil rights. If we refuse to hear a discrimination claim by a person whose interests are not represented in the decree, we create an exception to the limitations we presently place on res judicata and collateral estoppel.

Id. at 1517-1518 (footnote omitted). The Eleventh Circuit's conclusion seemingly is supported by the Court's statement in *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979), that "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party nor a privy and therefore has never had an opportunity to be heard", *id.* at 327 n.7, as well as buoyed by the dissent from the denial of certiorari in *Thaggard* v. *City of Jefferson*, wherein Justices Rehnquist and Brennan opined that the doctrine of "collateral attack" was contrary to the concept of due process of law as well as incon-

sistent with the general principles of preclusion. *See* 104 S.Ct. at 257-259.

The Court should grant the instant writ to lay to rest the "collateral attack doctrine".

2. The Instant Case, Like *Stotts*, Involves the Issue of a Court's Remedial Authority Under Section 706(g).

In *Stotts*, the Court seemingly adopted the proposition that since a consent decree is, in the final analysis, an order of the court, the terms of such a decree are subject to the remedial parameters of the statute upon which the decree is based. Thus, the Court stated as follows:

> "[T]he District's [sic] Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce," not from the parties' consent to the decree.

104 S.Ct. at 2587 n.9, *quoting System Federation No. 91* v. *Wright*, 364 U.S. 642, 651 (1961). *See also* 104 S.Ct. at 2605 n.9 (Blackmun, J., dissenting) ("The Court's analysis seems to be premised on the view that a consent decree cannot provide relief that could not be obtained at trial"); *id.* at 2594 n.3 (Stevens, Jr., concurring in the judgment) ("The Court seems to suggest that a consent decree cannot authorize anything that would not constitute permissible relief under Title VII"); *System Federation No. 91* v. *Wright*, 364 U.S. at 652-653 ("The type of decree the parties bargained for is the same as the only type of decree a court can properly grant — one with all those strengths and infirmities of any litigated decree . . . [T]he court was not acting to enforce a promise but to enforce a statute").

However, despite the language in *Stotts* and despite the fact that a Title VII consent decree has all the indicia of a post-litigation remedial order, *see* discussion *infra*, the First Circuit analogized the instant consent decree to a voluntary affirmative action plan adopted by private parties. While the First Circuit is not alone in its failure to acknowledge that a consent decree, as a remedial order of the court, is subject to the limitations of the court's statutory remedial authority, *see, e.g., Vanguards of Cleveland* v. *City of Cleveland*, 753 F.2d 479 (6th Cir. 1985), its view surely is wrong.

In this regard, the consent decree, in the instant case, is grounded on court adopted findings "of such past practices of discrimination of both a judicial and administrative nature, sufficient to sustain an action under Title VII. . ." In turn, the district court has granted injunctive relief to enforce the terms of the decree as well as periodically modified and extended the decree.[7] Finally, the consent decree expressly has overridden state law. As such, the only substantive distinction between the *Culbreath* litigation and the resulting findings and remedy therein and the results of a traditional, adversarial Title VII litigation is that the state defendants in *Culbreath* chose to accede voluntarily to the court's findings and remedy.

In addition, and more importantly, in the instant case, it is the court, and not the state defendants, that is affecting adversely the petitioners' constitutional and state law rights. As a result, the petitioners are precluded effectively from even attempting to vindicate their rights under federal or state law, since the petitioners may not attack collaterally orders of the court, including consent decrees. *See, e.g., Culbreath* v.

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[7] The district court, in November, 1981, entered a *Stotts*-type order protecting minorities from the effect of budgetary cutbacks. In addition, the court, in August, 1982, extended the decree to the then newly formed Department of Social Services.

Dukakis, 630 F.2d at 22. *But see United States* v. *Jefferson County*, *supra*.

In contrast, in the case of a voluntary affirmative action plan, it is the employer that may be affecting adversely the rights of non-minorities. However, the employer cannot insulate its affirmative action plan from a collateral attack by non-minorities who might seek to vindicate their state law or federal rights. *See W.R. Grace & Co.* v. *Rubber Workers*, 461 U.S. 757, 771 (1983) ("[A]lthough the Company and the Commission agreed to nullify the collective-bargaining agreement's seniority provisions, the conciliation process did not include the Union. Absent a judicial determination, the Commission, not to mention the Company, cannot alter the collective bargaining agreement without the Union's consent").

By analogizing the instant consent decree to a voluntary affirmative action plan, the First Circuit has permitted the plaintiff class in *Culbreath* and the state defendants to have the "best of both worlds", all to the detriment of the petitioners. Thus, the plaintiff class and the state defendants have the "benefits" of a decree that is insulated from collateral attack and that may be and has been modified and enforced by the court but do not have the "burdens" of the remedial limitations that are otherwise imposed on the court by the operative statute. The Court should grant the instant petition to remedy the fundamental unfairness that results from the lower court's refusal to conform the terms of the Title VII consent decree to the statutory restrictions that otherwise would govern court orders in fully litigated Title VII actions.

3. Racial Quotas for Promotional Positions in State Service Are Not Permissible Remedies Under Section 706(g) of Title VII.

In the aftermath of *Stotts*, several courts of appeal have considered the question of the meaning and application of

Stotts. Like the First Circuit herein, the courts have interpreted *Stotts* as prohibiting only remedial racial quotas that abridge rights under a bona fide seniority system protected by Section 703(h) of Title VII.[8] *See Turner* v. *Orr*, 759 F.2d 817, 824 (11th Cir. 1985); *EEOC* v. *Local 638*, 753 F.2d 1172, 1186 (2d Cir. 1985); *Vanguards of Cleveland* v. *City of Cleveland*, 753 F.2d at 486; *Diaz* v. *AT&T*, 752 F.2d 1356 n.5 (9th Cir. 1985) (dicta); *Van Aken* v. *Young*, 750 F.2d 43, 45 (6th Cir. 1984) (dicta); *Kromnick* v. *School District of Philadelphia*, 739 F.2d 894, 911 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 782 (1985) (dicta); *Grann* v. *City of Madison*, 738 F.2d 786, 795 n.5 (7th Cir.), *cert. denied*, 105 S.Ct. 296 (1984) (dicta). Although the First Circuit, an noted *supra*, has conceded that it and the other circuit courts "could be mistaken in [their] reading of current precedent." 765 F.2d at 275.

In interpreting *Stotts* as only disapproving racial quotas that impinge on bona fide seniority systems, the circuit courts have relied on the fact that such systems are protected by Section 703(h) of Title VII.[9] However, the purpose of Section 703(h)

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[8] In this regard, the First Circuit stated that —

> . . . the affirmative action ordered by the district court in *Stotts* was in direct conflict with a bona fide seniority system protected by section 703(h) of Title VII. Our case does not involve section 703(h) as there is no claimed conflict between a seniority plan and the remedies provided for in the decree.

765 F.2d at 273.

[9] Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) provides —

> Notwithstanding any other provision of this [subchapter], it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different

"was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII." *Teamsters* v. *United States*, 431 U.S. 324, 352 (1977). As such, the Court expressly has cautioned that Section 703(h) may not be read, as the First Circuit has herein, as "limiting or qualifying the relief authorized under § 706(g)." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 758-759 (1976). Indeed, to the extent the protections of Section 703(h) are relevant to the remedies available under Section 706(g), same include employer actions pursuant to "the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin." Thus, since there was, nor can be,[10] no claim that the promotional captain's examination did not meet the requirements for statutory protection under Section 703(h), said section clearly cannot provide the basis for distinguishing *Stotts* from the case at bar.

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locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability tests provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this [subchapter] for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)) [29 USCS § 206(d)].

[10] The *Culbreath* consent decree contains provisions not only requiring that the state conduct a validation study before administering any examination, but also providing that the state and the plaintiff class must agree that the validation study complies with the decree. If the parties cannot agree on the issue compliance, the court determines the matter.

Since Section 703(h) obviously cannot provide the justification for treating racial quotas that impinge on a bona fide seniority system different from racial quotas that impinge on a nondiscriminatory, merit, promotional system, that justification must emminate, if at all, from Section 706(g). However, as discussed below, there is no logical basis for assuming that the congressional policy behind Section 706(g) may vary from situation to situation and, as such, the Court's definition of that policy in *Stotts* must have equal force regardless of the facts giving rise to the particular dispute.

In this regard, the Court, in part B of its *Stotts* decision, considered the scope of the trial court's remedial authority in a Title VII proceeding. The specific question considered was whether the trial court, through the mechanism of racial quotas, could award, in effect, competitive seniority to minority employees without a corresponding finding that those specific employees who would receive the award of competitive seniority had been victims of discrimination. This issue arose in *Stotts* when the court of appeals affirmed the issuance by the district court of the injunction barring the City of Memphis from following its seniority system in determining who was to be laid off, based on the court of appeals' belief that the district court could have ordered this type of racial quota had the Title VII action been litigated on the merits. Thus, the Court stated as follows:

> A second ground advanced by the Court of Appeals in support of the conclusion that the injunction could be entered notwithstanding its conflict with the seniority system was the assertion that "[i]t would be incongruous to hold that the use of the preferred means of resolving an employment discrimination action decreases the power of a court to order relief which vindicates the policies embodied within Title VII, and 42 U.S.C. §§ 1981 and 1983." 679 F.2d at

> 566. The court concluded that if the allegations in the complaint had been proved, the District Court could have entered an order overriding the seniority provisions. Therefore, the court reasoned, "[t]he trial court had the authority to override the Firefighter's Union seniority provisions to effectuate the purpose of the 1980 Decree." 679 F.2d at 566.

__ U.S. __, 104 S.Ct. at 2588.

In addressing this issue, the Court initially noted that while it had held in *Franks* v. *Bowman Transportation Co.*, and *Teamsters* v. *United States* that Section 703(h) of Title VII did not affect an individual discriminatee's right to be awarded competitive seniority, the Court in *Teamsters* v. *United States*, had "made clear that mere membership in the disadvantaged class is insufficient to warrant a seniority award; each individual must prove that the discriminatory practice had an impact on him." __ U.S. at __, 104 S.Ct. at 2588.

The Court then considered whether its "ruling in *Teamsters* that a court can award competitive seniority only when the beneficiary of the award has actually been a victim of illegal discrimination is consistent with the policy behind § 706(g) of Title VII, which affects the remedies available in Title VII litigation." __ U.S. __, 104 S.Ct. at 2588-2589. In this regard, the Court concluded that the policy behind Section 706(g) "is to provide make-whole relief *only to those who have been actual victims of illegal discrimination*. . ." __ U.S. at __, 104 S.Ct. at 2589 (emphasis added). In support of this conclusion, the Court quoted four excerpts from the legislative history of Title VII.

First, the Court quoted the following floor remarks of Senator Humphrey:

> No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of Section 707(e) [enacted without relevant change as § 706(g)]. . . . Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require. . . firing . . . of employees in order to meet a racial 'quota' or to achieve a certain racial balance. That bugaboo has been brought up a dozen times; but is non-existent.

__ U.S. at __, 104 S.Ct. at 2589, *quoting* 110 Cong. Rec. 6549. Second, the Court cited a portion of an interpretive memorandum which it characterized as making "clear that a court was not authorized to give preferential treatment to non-victims." __ U.S. at __, 104 S.Ct. at 2589. The specific language cited was as follows:

> No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not discriminated against in violation of [Title VII]. This is stated expressly in the last sentence of section [706(g)]. . .

Id., *quoting* 110 Cong. Rec. 7214. Third, the Court quoted and emphasized the following portion of a memorandum describing the Title VII bill:

> Upon conclusion of the trial, the federal court may enjoin an employer or labor organization from practicing further discrimination and may order the hiring or reinstatement of an employee or the acceptance or reinstatement of a union member. *But Title VII does not permit the ordering of racial quotas in business or unions*. . . .

__ U.S. at __, 104 S.Ct. at 2589, *quoting* 110 Cong. Rec. 6566 (emphasis added by the Court). Lastly, the Court quoted with favor the following language from a bipartisan news letter:

> [U]nder title VII, not even a Court, much less the Commission, could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this title.

__ U.S. at __, 104 S.Ct. at 2590, *quoting* 110 Cong. Rec. 14465.

In addition to quoting the legislative history of Title VII, the Court majority specifically took issue with the dissent's contention that Congress, in the 1972 amendments to Title VII, had approved certain federal court decisions wherein the courts "had provided remedies to those who had not proven that they were victims." __ U.S. at __, 104 S.Ct. at 2590 n.15. In this regard, the Court noted the following:

> We have already rejected, however, the contention that Congress intended to codify all existing Title VII decisions when it made this brief statement. See *Teamsters, supra*, 431 U.S., at 354, n.39, 97 S.Ct.,

at 1864, n.39. Moreover, the statement on its face refers only to those sections not changed by the 1972 amendments. It cannot serve as a basis for discerning the effect of the changes that were made by the amendment. Finally, and of most importance, in a later portion of the same section-by-section analysis, the sponsors explained their view of existing law and the effect that the amendment would have on that law.

"The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present §706(g) *the courts have stressed that the scope of relief under that section of the Act is intended to make victims of unlawful discrimination whole*, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that *persons aggrieved by consequences and effects of the unlawful employment practice be*, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." *Id.*, at 7168 (emphasis added).

As we noted in *Franks*, the 1972 amendments evidence "emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible *the victims of racial discrimination*." 424 U.S., at 764, 96 S.Ct., at 1264 (emphasis added).

Id. (emphasis in original).

Accordingly, in *Stotts*, the Court examined the policy underlying Section 706(g) of Title VII. In undertaking this examination, the Court did *not* consider the narrow issue of what is the policy underlying Section 706(g) in cases involving layoffs and bona fide seniority systems. Rather, the Court sought to identify the general policy behind § 706(g) expressly for the purpose of determining whether its holding in *Teamsters* v. *United States* was "consistent with" that policy. *See* __ U.S. at __, 104 S.Ct. at 2588.[11]

In unmistakeable language, the Court held that the policy behind the remedial provision of Title VII is to provide relief only for the actual victims of discrimination. To suggest, as the circuit courts have done to date, that the Court in *Stotts* only articulated the policy underlying Section 706(g) for cases involving layoffs in the context of a bona fide seniority system is to ignore the clear and unequivocal language of the Court's opinion. The Court should grant the instant petition to give effect to the reasoning and clear import of *Stotts*.

4. A Voluntary Affirmative Action Plan Involving State Action Violates the Equal Protection Clause of the Fourteenth Amendment.

If the Court, like the First Circuit, considers the instant consent decree to be akin to a voluntary affirmative action plan and, as such, not subject to the remedial limitations contained in Section 706(g), the Court, nevertheless, should grant the instant petition to address one of the questions expressly left open by the Court in *United Steelworkers of America* v. *Weber*, i.e. whether the Equal Protection Clause of the Fourteenth Amendment forbids the state from imposing racial quotas pursuant to a voluntary affirmative action plan.

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[11] "Our ruling in *Teamsters* that a court can award competitive seniority only when the beneficiary of the award has actually been a victim of illegal discrimination is consistent with the policy behind § 706(g) of Title VII. . ."

In this regard, in *University of California Regents* v. *Bakke*, 438 U.S. 265 (1978), the Court stated that it had "never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations." *Id.* at 307. In the instant case, it would seem clear and only fair that, if the *Culbreath* consent decree is not considered to be a court order under Section 706(g) of Title VII and, as such, subject to the remedial limitations contained in said section, then the Stipulation of Facts may not be considered judicial findings of a statutory violation. Accordingly, under the principle articulated in *Bakke* and quoted above, the state defendants herein have abridged unlawfully the petitioners' Fourteenth Amendment equal protection rights.

Conclusion.

For the reasons set forth in detail above, the Petitioners, Robert T. Devereaux, *et al.*, respectfully urge that the Court grant the instant writ.

Respectfully submitted,

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Appendix A.

Robert T. DEVERAUX, et al.,
Plaintiffs, Appellants,

v.

William J. GEARY, et al.,
Defendants, Appellees,

and

Plaintiff-Class in Culbreath v. Dukakis,
Intervenors-Appellees.

No. 84-2004.

United States Court of Appeals,
First Circuit.

Argued April 5, 1985.
Decided June 24, 1985.

Police officers brought action against officials of Metropolitan District Commission, challenging continued validity of consent decree entered in former action concerning racial discrimination in employment. Officials moved to dismiss and representatives of former class in former case moved to intervene. The United States District Court, for the District of Massachusetts, A. David Mazzone, J., 596 F.Supp. 1481, allowed motion to dismiss and allowed representatives' motion to intervene and plaintiffs appealed. The Court of Appeals, Levin H. Campbell, Chief Judge, held that decision of United States Supreme Court in *Firefighters Local Union No. 1784 v. Stotts*, did not constitute an "unusual circumstance" permitting police officers to intervene.

Affirmed.

Federal Civil Procedure 337

Decision of United States Supreme Court in *Firefighters Local Union No. 1784 v. Stotts*, limiting district court's authority to impose new seniority system upon unwilling employer in contravention of existing bona fide seniority system does not constitute an "unusual circumstance" permitting police officers to intervene in employment discrimination action to secure modification of consent decree where original parties had voluntarily agreed to challenged provisions in consent decree and parties had stipulated that sufficient discriminatory patterns and practice existed to support Title VII action. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ. Proc.Rule 24, 28 U.S.C.A.

Gabriel O. Dumont, Jr., Boston, Mass., with whom Grady, Dumont & Dwyer, Boston, Mass., was on brief for plaintiffs, appellants.

Charles J. Cooper, Deputy Asst. Atty. Gen., Michael A. Carvin and Mary E. Mann, Attys., Dept. of Justice, and Wm. Bradford Reynolds, Asst. Atty. Gen., Washington, D.C., were on brief for the U.S., amicus curiae.

Despena Fillios Billings, Asst. Atty. Gen., Boston, Mass., with whom Francis X. Bellotti, Atty. Gen., Boston, Mass., was on brief for defendants-appellees.

James H. Wexler, Boston, Mass., with whom Herrick & Smith, Herman J. Smith, Jr., Boston University Legal Aid Program, Ilene Seidman and Ruth Diaz-Aguilar, Greater Boston Legal Services, Boston, Mass., were on brief for intervenors-appellees.

Jonathan M. Albano, Boston, Mass., with whom John F. Adkins, Bingham, Dana & Gould, Marjorie Heins, Massachusetts Civil Liberties Union Foundation, Barbara Arnwine, Lawyers' Committee for Civil Rights Under Law of the Boston

Bar Ass'n, Boston, Mass., William L. Robinson and Richard T. Seymour, Lawyers' Committee for Civil Rights Under Law, Washington, D.C., were on brief for the Lawyers' Committee for Civil Rights Under Law of the Boston Bar Ass'n, Civil Liberties Union of Massachusetts, and Lawyers' Committee for Civil Rights Under Law, amici curiae.

Before CAMPBELL, Chief Judge, BOWNES and BREYER, Circuit Judges.

LEVIN H. CAMPBELL, Chief Judge.

Plaintiffs, five non-minority members of the Metropolitan District Commission ("MDC") police force, appeal from a judgment of the United States District Court for the District of Massachusetts, 596 F.Supp. 1481, dismissing their complaint for failure to state a claim upon which relief could be granted after finding their attempt to intervene in the case of *Culbreath v. Dukakis* untimely.

The issue, whose resolution will decide the procedural as well as the substantive question before us, is whether the Supreme Court's decision in *Firefighters Local No. 1784 v. Stotts*, ___ U.S. ___, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984), requires us to read Title VII of the Civil Rights Act as prohibiting voluntary affirmative action efforts like those reflected in the *Culbreath* consent decree which benefit individuals who are not proven victims of actual discrimination. Arguing that *Stotts* compels such a reading, plaintiffs insist that they should be permitted to intervene in *Culbreath* in order to secure a modification of the consent decree.

We agree with the district court that *Stotts* (which dealt with a different situation) does not make it clear that the challenged consent decree is no longer lawful. The weight of circuit authority construes *Stotts* as not invalidating such a decree. Partic-

ularly as the challenged decree has only about two more years to run, and as the Supreme Court will soon hear a case that could clarify the issue, we decline to tamper with the *Culbreath* decree at this time. We affirm the judgment of the district court.

I.

This controversy has its roots in an action brought in 1974 by minority state employees against state officials. The minority employees, later certified as a class, sought to correct alleged historical and ongoing discriminatory hiring and promotional practices in the state civil service. *See Culbreath v. Dukakis*, 630 F.2d 15 (1st Cir. 1980) (action originally brought *sub nom. Jackson v. Sargent*, No. 74-24633-MA). After two years of negotiations, the parties submitted a proposed stipulation of facts and consent decree to the district court. The stipulation stated that there was a disproportionate underemployment of minorities in certain state agencies and that such underemployment had been caused by employment practices engaged in, or perpetuated by, defendants. The stipulation represented,

> [t]he parties believe that the stipulation of facts set forth below and acknowledged by the Court constituted findings of past practices of discrimination of both a judicial and adminstrative nature, sufficient to sustain an action under Title VII of the Civil Rights Act of 1964, thereby providing sufficient grounds for the remedies set forth in the Decree.[1]

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[1] The plaintiff class in *Culbreath* originally grounded its claims on 42 U.S.C. §§ 1981, 1983, not on Title VII. About two years into the litigation, however, the Supreme Court ruled in *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1979), that in section 1981 and section 1983 actions, plaintiffs must prove intentional discrimination to recover. Since the *Culbreath*

The *Culbreath* consent decree then set forth the terms of a negotiated settlement, including goals for the appointment and promotion of minorities in civil service job grades in the MDC for a period of eight years, beginning in January 1979 and ending in December 1987.

Between November 1978 and February 1979, more than four years after the action's commencement and contemporaneously with the submission of the proposed stipulation and decree, the Massachusetts Organization of State Engineers and Scientists, Locals 285 and 509, the Service Employees International Union, AFL-CIO, the Massachusetts Law Enforcement Council, and the National Association of Government Employees filed motions to intervene in *Culbreath*. After notice to the class, *see* Fed.R.Civ.P. 23(e), the district court held a hearing on the entry of the consent decree and the motions to intervene. In August 1979, the court denied the motions to intervene as untimely and entered the stipulation of facts and the consent decree.

This court upheld the district court's decision to deny the motions to intervene in *Culbreath v. Dukakis*, 630 F.2d 15 (1st Cir. 1980). We evaluated four factors that aid in determining whether intervention requests are "timely" under Fed.R.Civ.P. 23(1) the length of time the potential intervenors knew or reasonably should have known of their interest before they petitioned to intervene; (2) the prejudice to existing parties due to the potential intervenor's failure to petition for intervention promptly; (3) the prejudice the potential intervenors would suffer if they were not allowed to intervene; and (4) the existence of unusual circumstances militating either for or against

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complaint did not contain allegations of intentional discrimination, the parties in *Culbreath* treated the action as one brought pursuant to Title VII. For purposes of this appeal, it is clear that the *Culbreath* consent decree was entered under Title VII and must be reviewed accordingly. See note 2, *infra*.

intervention. *See id.* at 20-24. *See also Stallworth v. Monsanto Co.*, 558 F.2d 257, 264 (5th Cir.1977). After finding that the would-be intervenors reasonably should have known of their interest four years before they petitioned to intervene, that they would not be prejudiced by denial of intervention, and that the parties' interests could be severely hampered if intervention were permitted, we concluded that the district court correctly found the intervention petitions untimely.

In July 1984, the instant action was brought by five white, male police lieutenants against William J. Geary, the Commissioner of the MDC, and Thomas E. Keogh, Superintendent of the MDC police force. Plaintiffs challenge the promotion of a black officer, Donald E. Callender, to a provisional position as an MDC police captain pursuant to the promotion guidelines of the consent decree. Specifically, they contend that although they all scored higher than Callender on the competitive examination administered to determine promotion eligibility, they were denied the opportunity to be considered for the position of temporary MDC police captain because of their race. They also state that ultimately one plaintiff who would have received the position had the consent decree not required that this position be filled by a minority was denied the position because of his race. They claim that by making race "the determinative selection factor," defendants deprived plaintiffs of their fourteenth amendment equal protection rights and violated 42 U.S.C. § 1981.

On August 8, 1984, defendants filed a motion to dismiss. On August 16, 1984, the *Culbreath* class filed a motion to intervene as a defendant, which was unopposed, and a motion to dismiss. After all parties submitted briefs on the motions to dismiss, the district court granted the class's motion to intervene and allowed defendants' motions to dismiss.

The district court chose to treat plaintiffs' complaint as a motion to intervene in *Culbreath*, rather than as an impermis-

sible collateral attack on the *Culbreath* consent decree. In addressing the timeliness of plaintiffs' attempt to intervene, the court found that but for the Supreme Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, the situation before the court was the same as that before it when it denied the prior petitions to intervene in 1980. It ruled that absent *Stotts*, the *Stallworth* factors unambiguously required a denial of intervention and a dismissal of the case.

The issue, then, was whether the *Stotts* decision so changed the law of Title VII that it constituted an "unusual circumstance" militating for intervention[2] and, ultimately, for revision of the consent decree. The district court rejected plaintiffs' argument that the *Stotts* Court meant to rewrite Title VII law to make all affirmative action plans improper absent a finding of actual past discrimination. It noted,

> [h]ad the Court intended to radically change its interpretation of Title VII law so as to require a finding of actual discrimination in any affirmative action case, I believe it would have said so. In the absence of clearer authority, I decline to read such an expansive meaning into an opinion limited to a discussion of layoffs made in violation of a bona fide senority system. The plaintiffs here seek too broad a rule from too narrow a set of facts.

We concur in this analysis and accordingly affirm.

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[2] Plaintiffs argue that the fourth *Stallworth* factor, the existence of unusual circumstances militating for intervention, applies here. *See* page 270, *supra*. They contend that the Court's decision in *Stotts* changed the law of Title VII so as to render parts of the *Culbreath* consent decree invalid, and that the Court has expressly ordered that "when a change in the law [brings] the terms of a consent decree into conflict with the statute pursuant to which the decree was entered, the decree should be modified over the objections of one of the parties bound by the decree." *Stotts*, ___ U.S. at ___ n. 9, 104 S.Ct. at 2587 n. 9 (citing *System Federation No. 91 v. Wright*, 364 U.S. 642, 651, 81 S.Ct. 368, 373, 5 L.Ed.2d 349 (1961)).

II.

In *Stotts*, a plaintiff class of black firefighters sued the Memphis, Tennessee, Fire Department and state officials alleging a pattern or practice of discrimination in hiring and promotion decisions in violation, among other provisions, of Title VII. A consent decree was entered into which had the stated purpose of remedying the Department's hiring and promotion practices with respect to blacks. The City, however, specifically indicated in the decree that it did not admit to "'any violations of law, rule or regulation with respect to the allegations'" in the complaint. *Stotts*, ___ U.S. at ___, 104 S.Ct. at 2581. Providing that minority membership in the Fire Department would be increased to approximate the proportion of minorities in the county labor force, the decree set as an interim hiring goal the filling of 50 percent of job vacancies annually with qualified black applicants. The decree did not, however, provide against the possibility of future layoffs. *Id.*

Nearly a year after the district court approved and entered the decree, the City announced that due to budget deficits, it would have to lay off a number of city personnel. The City declared that it would base the layoffs on the "last hired, first fired" rule provided for in a seniority system adopted pursuant to an earlier city-wide consent decree with the United States. *Id.* The district court, however, at the request of the class and over the objection of the City, entered an injunction forbidding the seniority-based layoffs. The court found that the layoffs would have a racially discriminatory effect, which rendered the otherwise valid seniority system not a "bona fide" one protected under Title VII. In response to this order, the City proposed and the court approved a modified plan requiring that layoffs be made in accordance with a racial quota designed to preserve the advances made through the consent decree in

increasing the proportion of black employees on the force. The layoffs were then carried out, and as a result of the court's order, certain non-minority employees with more seniority than minority employees were laid off or demoted in rank.

The Sixth Circuit affirmed the district court's order, although it held that the seniority system was a "bona fide" one. It concluded that the seniority-based layoffs would violate the terms of the consent decree by decreasing the percentage of minorities in the Department and that the district court therefore had the power to enforce the decree by ordering the modification of the seniority-based layoff system. Alternatively, the Sixth Circuit held that the district court's order was valid even if seen as a modification of the decree because new and unforeseen circumstances had created a hardship for one of the parties to the decree. *Stotts*, ___ U.S. at ___, 104 S.Ct. at 2583. The court rejected the argument that any modification was improper because it conflicted with a bona fide seniority system immunized from Title VII attack by section 703(h) of that Act. *Id.*

The Supreme Court reversed, ruling that the district court's injunction could not be justified either as an effort to enforce the consent decree or as a modification of the decree that could be forced on the City without its consent. The Court saw "the issue at the heart of the case" as "whether the district court exceeded its powers in entering an injunction requiring white employees to be laid off, when the otherwise applicable seniority system would have called for the layoff of black employees with less seniority." *Id.* at ___, 104 S.Ct. at 2584.

In resolving this question, the Court first pointed out that the "injunction does not merely enforce the agreement of the parties as reflected in the consent decree." *Id.* at ___, 104 S.Ct. at 2586.

The Court then turned to the question of whether the district court's order could be sustained as a valid modification of the

decree. *Id.* at ___ - ___, 104 S.Ct. at 2586-91. The Court relied on *System Federation No. 91 v. Wright*, 364 U.S. 642, 81 S.Ct. 368, 5 L.Ed.2d 349 (1961) (a court, upon motion of a party, must modify a consent decree when a change in the law brings it into conflict with the objectives of the statute that authorized it), in ruling that a district court cannot modify a Title VII consent decree over the objection of one of the parties if the resulting order conflicts with the statute underlying the consent decree. *Stotts*, ___ U.S. at ___, n. 9, 104 S.Ct. at 2587 n. 9. The Court then found that the proposed modification conflicted with Title VII and that the district court's authority to impose a new seniority system upon an unwilling employer in contravention of an existing bona fide seniority system is therefore limited to situations where this relief is appropriate under Title VII, *i.e.*, when the individual plaintiffs can prove that they have been the actual victims of discriminatory practices.

In reaching this result, the Court relied upon its earlier decision involving section 703(h)[3] in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976). In *Franks*, the Court had held that section 703(h) merely states that the operation of a bona fide seniority system will not constitute an illegal discriminatory employment practice, and does not bar retroactive awards of seniority as relief appropriate under section 706(g). The Court also relied upon

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[3] Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), provides:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . .

its ruling in *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), that an individual had to prove that a discriminatory practice had an impact on him before a court could award him retroactive seniority. The Court went on to state that "[o]ur ruling in *Teamsters* that a court can award competitive seniority only when the beneficiary of the award has actually been a victim of illegal discrimination is consistent with the policy behind § 706(g) of Title VII,[4] which affects the remedies available in Title VII litigation." *Stotts*, ___ U.S. at ___, 104 S.Ct. at 2589 (footnotes omitted). The Court referred to statements made in the Title VII congressional debates in which the policy behind section 706(g) was "repeatedly expressed": "to provide make-whole relief only to those who have been actual victims of illegal discrimination." *Id.*

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[4] Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

The contention that *Stotts* controls this case must be based on . ferences drawn from open-ended languaged in the *Stotts* opinion, as the facts and issues in *Stotts* are plainly distinguishable. Unlike the situation in *Stotts*, we are not concerned here with a district court's power over objection of one of the parties to the decree, to order retroactive relief that the consent decree never provided. Rather, the present plaintiffs challenge provisions in the consent decree to which the original parties had voluntarily agreed. Additionally, the affirmative action ordered by the district court in *Stotts* was in direct conflict with a bona fide seniority system protected by section 703(h) of Title VII. Our case does not involve section 703(h) as there is no claimed conflict between a seniority plan and the remedies provided for in the decree.

A further distinction is that the parties to the *Stotts* decree had expressly disclaimed that the violations alleged in the complaint existed, whereas in this case the parties stipulated that discriminatory patterns and practices existed that were sufficient to support a Title VII action.

The above distinctions have been regarded as crucial by other circuits. *See EEOC v. Local 638*, 753 F.2d 1172, 1186 (2d Cir. 1985) (distinguishing *Stotts* because here there was no direct conflict with a bona fide seniority plan; the *Stotts* Court's decision involved the retroactive award of competitive seniority, not the prospective relief awarded here; and unlike *Stotts*, here there was a finding that plaintiffs intentionally discriminated against non-whites). *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 486 (6th Cir.1985) (distinguishing *Stotts* on the facts and rejecting plaintiffs' argument that *Stotts* controls where voluntary plan did not directly deal with seniority). *Diaz v. American Telephone & Telegraph*, 752 F.2d 1356, 1360 n. 5 (9th Cir.1985) (limiting *Stotts* to its facts). *Van Aken v. Young*, 750 F.2d 43, 45 (6th Cir.1984) (distinguishing *Stotts* because the instant case involved an af-

firmative action plan voluntarily applied by city at point of hiring and unrelated to seniority rights). *Wygant v. Jackson Board of Education*, 746 F.2d 1152, 1157-58 (6th Cir.1984) (*Stotts* does not affect affirmative action plan that "resulted from voluntary decisions in the collective bargaining process"), *cert. granted*, ___ U.S. ___, 105 S.Ct. 2015, 85 L.Ed.2d 298 (1985). *Kromnick v. School District of Philadelphia*, 739 F.2d 894, 911 (3d Cir.1984) (distinguishing *Stotts* because here there is "no overriding of a bona fide seniority plan, and no requirement of race-conscious layoffs"), *cert. denied*, ___ U.S. ___, 105 S.Ct. 782, 83 L.Ed.2d 777 (1985). *Grann v. City of Madison*, 738 F.2d 786, 795 n. 5 (7th Cir.) (distinguishing *Stotts* by stating that here, discrimination is acknowledged, the city defendant agreed to the relief provided, and this case involves promotions and pay, not seniority rights), *cert. denied*, ___ U.S. ___, 105 S.Ct. 296, 83 L.Ed.2d 231 (1984). *See also Hammon v. Barry*, 606 F.Supp. 1082, 1095 (D.D.C.1985) (rejecting suggestion that *Stotts* precludes use of any race-conscious affirmative action plan and distinguishing *Stotts* on ground that this is a voluntary plan that does not directly affect vested seniority rights). *Turner v. Orr*, 759 F.2d 817, 823-826 (11th Cir.1985) (distinguishing *Stotts* because this case did not involve infringement of a bona fide seniority system; no third party rights are involved here as no non-minority worker had to step down to accommodate a minority; and this case involves a consent judgment entered into by the parties). *NAACP v. Detroit Police Officers Association*, 591 F.Supp. 1194, 1202-03 (E.D. Mich.1984) (distinguishing *Stotts* on ground that it dealt with court-imposed affirmative action plan that did not by its terms deal with layoff question whereas the plan at bar was voluntary and explicitly adjusted seniority rights).

Plaintiffs argue that although *Stotts* may be factually distinguishable, the clear implication of the Court's language in *Stotts* outlaws the use of any race-conscious affirmative action plan.

We are not so sure. It is not easy to determine from the plurality opinion in *Stotts* just how far a majority of the Court would want to go in the present situation. Moreover, the Court had earlier held in *United Steelworkers of America v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 486 (1979), that Title VII does not forbid private employers from voluntarily entering into affirmative action plans to eliminate manifest racial imbalances in employment categories. The expansive reading of *Stotts* urged by plaintiffs would require us to find that *Stotts* overruled *Weber sub silentio*. In view of the importance of any such action, it seems likely that the Court would have directly addressed *Weber* if it had intended to overrule that decision. All the circuits considering the issue have concluded, in the absence of any express announcement to the contrary, that *Weber* reamins good law.[5] *See EEOC v. Local 638*, 753 F.2d at 1185-86; *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d at 487-88; *Diaz v. American Telephone*

[5] Although plaintiffs do not specifically raise the point, the fact that one of the parties to the consent decree challenged in this case is the City, a public employer, does not alter our analysis. The *Stotts* Court expressly declined to consider whether Title VII would prohibit the City of Memphis from voluntarily achieving the sames results as the district court's order in adopting an affirmative action plan. *Stotts*, ___ U.S. at ___, 104 S.Ct. at 2590. In the absence of a definitive ruling from the Court, we adhere to the precedent upholding the validity of voluntary affirmative action programs instituted by public employers. *See Bushey v. New York State Civil Service Commission*, 733 F.2d 220, 227 n. 8 (2d Cir.1984) ("We reject Plaintiffs' contention that *Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 . . ., is inapplicable because the employer in *Weber* was a private entity whereas here it is a public entity."). *See also Kirkland v. New York State Department of Correctional Services*, 711 F.2d 1117 (2d Cir.1983) (applying *Weber*), *cert. denied*, ___ U.S. ___, 104 S.Ct. 997, 79 L.Ed.2d 230 (1984); *Bratton v. City of Detroit*, 704 F.2d 878, 884 n. 18 (6th Cir.1983) (applying *Weber*), *cert. denied*, ___ U.S. ___, 104 S.Ct. 703, 79 L.Ed.2d 168 (1984); *Local Union No. 35 v. City of Hartford*, 625 F.2d 416, 435 (2d Cir.1980) (applying *Weber*), *cert. denied*, 453 U.S. 913, 101 S.Ct. 3148, 69 L.Ed.2d 997 (1981). *Cf. Associated General Contractors of Massachusetts, Inc. v. Altshuler*, 490 F.2d 9, 17 (1st Cir.1973), *cert. denied*, 416 U.S. 957, 94 S.Ct. 1971, 40 L.Ed.2d 307 (1974).

& Telegraph, 752 F.2d at 1360 n.5; *Van Aken v. Young*, 750 F.2d at 45; *Wygant v. Jackson Board of Education*, 746 F.2d at 158; *Kromnick v. School District of Philadelphia*, 739 F.2d at 911; *Grann v. City of Madison*, 738 F.2d at 795 n. 5.

We recognize, of course, that this is a difficult and sensitive area in which we and the other circuit courts could be mistaken in our reading of current precedent. But this hardly seems the case or the moment for us to strike out in a new direction. The consent decree that plaintiffs wish to challenge has almost run its course, expiring by its own terms in 1987. Up to now people have relied on the decree as reflecting both the agreement of the parties and the command of a federal court. Unless we can say with greater certainty than is now possible that the decree, contrary to former assumptions, is invalid, it would seem better to leave it undisturbed, at least until the Supreme Court has shed more light in this area, which it quite possibly may do within the next term. *See Wygant v. Jackson Board of Education*, 746 F.2d 1152 (6th Cir.1984), *cert. granted*, ___ U.S. ___, 105 S.Ct. 2015, 85 L.Ed.2d 298 (1985).[6]

Affirmed.

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[6] In *Wygant*, the Sixth Circuit held that a collective bargaining agreement that, as part of the school board's voluntary affirmative action plan, limited layoffs of minority group teachers in the event of reductions in staff, did not, despite the absence of direct findings of discrimination against minority teachers, violate the equal protection clause or Title VII. *See Wygant*, 746 F.2d 1152, certiorari granted ___ U.S. ___, 105 S.Ct. 2015, 85 L.Ed.2d 298. *See also* 53 U.S.L.W. 3692 (subject matter summary of case recently docketed). The Court granted certiorari to examine the question of whether the Constitution tolerates racial preferences for teacher layoffs adopted by a public employer, in the absence of findings of past discrimination, that are based solely upon the disparity between respective percentages of minority faculty members and students. *Id.*

Appendix B.

Robert T. DEVERAUX, et al.,
Plaintiffs,

v.

William J. GEARY, et al., Defendants.

Civ. A. No. 84-2181-MA.

United States District Court,
D. Massachusetts.

Nov. 7, 1984.

Police officers brought action against officials of Metropolitan District Commission, challenging continued validity of consent decree entered in former action concerning racial discrimination in employment. Officials moved to dismiss and representatives of class in former case moved to intervene. The District Court, Mazzone, J., held that: (1) case at bar was attempt to intervene in former case; (2) such attempt to intervene was untimely; and (3) representatives' motion to intervene would be allowed.

Motion to dismiss allowed; representatives' motion to intervene allowed.

1. Federal Civil Procedure 331

Separate suit which directly attacked consent decree in former discrimination case and sought to interfere with goals established by such decree was attempt to intervene in former case.

2. Federal Civil Procedure 2397.5

Title VII law was not so substantially changed by *Stotts* decision of Supreme Court as to invalidate existing consent decree which was designed to remedy alleged discriminatory employment practices by establishment of "annual minority hiring objective." Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A § 2000e et seq.

3. Federal Civil Procedure 320

Attempt by police officers to intervene in action, which had five years previously resulted in consent decree designed to remedy alleged discriminatory employment practices, was untimely.

4. Federal Civil Procedure 337

Where representatives on behalf of class in action which five years previously had resulted in consent decree designed to remedy alleged discriminatory employment practices had significant interest in outcome of employees' action challenging continued validity of such decree, resolution of case at bar in favor of employees would have substantially adverse impact on interests of class, and employees could not adequately represent interests of class, representatives' motion to intervene would be allowed. Fed.Rules Civ.Proc.Rule 24(a), 28 U.S.C.A.

Gabriel O. Dumont, Jr., Grady, Dumont & Dwyer, Boston, Mass., for plaintiffs.

Despena F. Billings, Asst. Atty. Gen., Boston, Mass., for defendants.

James H. Wexler, Herrick & Smith, Boston, Mass., for intervenors.

MEMORANDUM AND ORDER

MAZZONE, District Judge.

The issue in this procedurally complicated case is straightforward: does a recent Supreme Court decision so change Title VII law as to require modification of a five year old consent decree in a racial discrimination case? The plaintiffs in this case argue that the decision, *Firefighters Local Union No. 1784 v. Stotts*, ___ U.S. ___, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984) brings into question the validity of the consent decree in this and other affirmative action cases.

I.

The plaintiffs in this case are five white police officers employed by the Metropolitan District Commission (MDC), an agency of the Commonwealth of Massachusetts. On April 23, 1983, they took a competitive examination to determine their eligibility for promotion to captain. In early June, 1984, one temporary captain position became available. On July 6, 1984, Donald E. Callender (Callender), a black police officer, was awarded the position, although his score on the examination was lower than those of the plaintiffs. Callender was awarded the job as a result of the MDC's efforts to comply with the "minority employment objectives" established by a consent decree entered by this Court on August 27, 1979 in *Culbreath v. Dukakis* (D.Mass., No. 74-2463-MA). That consent decree entered in response to a class action brought by plaintiffs who alleged significant under-representation of minorities in several Massachusetts agencies, including the MDC. The decree included a stipulation that it was designed to remedy the widespread discriminatory employment practices alleged in the complaint.

The mechanics of the decree were as follows. Each affected state agency was to establish two separate civil service eligibility lists for each job title covered by the decree. The first list would be the usual list required by state law. The second would be a special minority eligibility list, from which the agency was to select applicants until the "annual minority hiring objective" for the job category and department was met.

In the present case, the MDC had failed to meet its annual minority hiring objective for the position of Provisional MDC Police Captain as of the date the position became available in June, 1984. The MDC apparently selected Callender from the special minority eligibility list in an effort to comply with the requirements of the consent decree.

The plaintiffs filed suit against William J. Geary, Commissioner of the MDC, and Thomas E. Keogh, Superintendent of the MDC (collectively, the defendants) on July 16, 1984. They claim that the defendants have violated their civil rights, specifically their right of equal protection as guaranteed by the Fourteenth Amendment and 42 U.S.C. § 1981. But for their race, they claim, one of them would have been awarded the position given to Callender.

On August 8, 1984, the defendants filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6), claiming the following. First, this Court lacks jurisdiction because the Eleventh Amendment bars a federal court from ordering state officials to conform their actions to state law. The substance of the claim, they argue, is that the MDC officials did not comply with the state civil service hiring and promotion guidelines.[1] Second, the plaintiffs have failed to state a claim

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[1] In light of the disposition of this case made below, I do not reach the defendants' argument that this Court lacks jurisdiction due to the Eleventh Amendment.

upon which relief can be granted because (a) they lack standing; (b) the claims are barred by the doctrine of *res judicata;* and (c) the state defendants were complying with the *Culbreath* consent decree.

On August 16, 1984, representatives on behalf of the plaintiff class in *Culbreath* (the Class) moved to intervene pursuant to Fed.R.Civ.P. 24(a). The Class claims that it has a substantial interest relating to the subject of the litigation in that the ultimate relief sought by the plaintiffs would have the effect of vacating *Culbreath* and would therefore have a substantially adverse impact on the interests of the Class. It also claims that the present defendants cannot adequately represent the interests of the Class in this case. The Class filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), claiming that (a) the defendants' action was consistent with the consent decree and (b) the plaintiffs' claims are barred by the doctrine of *res judicata.*

On August 30, 1984, the plaintiffs filed their opposition to the defendants' motion to dismiss. To date, the plaintiffs have not opposed the motion of the Class to intervene in this case. The case is therefore before this Court on the defendants' motion to dismiss and the unopposed motion of the Class to intervene in this case.

II.

[1] Although filed as a separate suit, it is apparent that this suit is in essence an attack on the *Culbreath* consent decree. The plaintiffs themselves have stated:

> Assuming that the instant proceeding is more properly viewed as an effort to intervene in the *Culbreath* case, such intervention should be permitted. In this regard . . . *Stotts* represents a significant and substantial shift in Title VII law.

Plaintiffs' brief at 10. Both the defendants and the Class have filed memoranda arguing that this suit constitutes an attempt to intervene in the *Culbreath* case. Defendants' brief at 9; Class' brief at 3. Since the present action directly attacks this Court's order in *Culbreath* and seeks to interfere with the goals established by the consent decree, I find that it constitutes an attempt to intervene in that case. As such, this Court's decision is guided by the First Circuit opinion affirming this Court's refusal to permit a prior intervention in the *Culbreath* case. *Culbreath v. Dukakis*, 630 F.2d 15 (1980).

In that opinion, the court adopted the test set forth in *Stallworth v. Monsanto Co.*, 558 F.2d 257 (5th Cir.1977). *Stallworth* sets forth four factors to be considered in determining the propriety of permitting intervention: (1) the length of time the intervenor knew or reasonably should have known of his interest before he petitioned to intervene; (2) prejudice to existing parties due to the plaintiffs' failure to petition for intervention promptly; (3) the prejudice the plaintiffs would suffer if they are not allowed to intervene; and (4) the existence of unusual circumstances militating either for or against intervention. I treat these factors *seriatim*.

1. *Length of time the intervenor knew or reasonably should have known of this interest before he petitioned to intervene.*

The facts presently before this Court are virtually identical to those before the Circuit Court in 1980, with the exception of the existence of the *Stotts* opinion. It is clear that if it was unreasonable for the labor unions in that case to intervene more than four years after the complaint was filed, it is even more unreasonable to permit the plaintiffs to intervene now, more than ten years after the complaint was filed. In their brief, the plaintiffs make the puzzling statement that they "were

not potential intervenors" in *Culbreath*. Plaintiffs' brief at 10. The basis of this statement is not altogether clear to me. The brief states that the Massachusetts Law-Enforcement Council (MLEC), one of the unions barred from intervening in 1980, was no longer the official statewide law enforcement bargaining unit as of November 22, 1977. Even if MLEC did not represent police officers as of the date its petition to intervene was denied, the goals and mechanisms sought by the complaint in *Culbreath* were well publicized. *Culbreath*, 630 F.2d at 21. It is inconceivable that the plaintiffs did not previously know of the consent decree and its impact on their rights given that it has been five years since the decree was approved and implemented. The plaintiffs' brief offers no indication of why these police officers were not aware of and should not be bound by the *Culbreath* decree. Like the Circuit Court, I "see no excuse for the failure [of the plaintiffs] to learn of a suit and reported decisions so related to [their] promotion prospects. . . ." *Id.*

2. *Prejudice to existing parties due to the plaintiffs' failure to petition for intervention promptly.*

If the plaintiffs in this case are successful, the effect will be to disallow implementation of the consent decree. Nothing could more clearly prejudice the interests of the existing parties. The plaintiffs' success would constitute an extreme example of "last minute disruption of painstaking work by the parties and the court." *Id.* at 22 (citations omitted).

3. *The prejudice the plaintiffs would suffer if they are not allowed to intervene.*

Because the present plaintiffs' claims of prejudice are identical to those raised by the unions in the First Circuit's *Culbreath* decision, the discussion of this issue in that case is particularly helpful:

> The unions' second claim of prejudice, that the minority employment and promotion mechanisms of the consent decree violate the fourteenth amendment and sections 703(h) and (j) of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2(h) and (j), has caused us more concern. While this is not an unusual argument in a race discrimination case, the tenuous posture of the unions gives it added importance. *If we affirm the district court's denial of intervention for untimeliness, the unions and their members may be forever foreclosed from challenging the goal mechanisms of the decree. Collateral attack on the decree will be impossible because only the district court supervising implementation of the decree will have subject matter jurisdiction to modify the decree. Intervention to modify the decree, the proper procedural recourse under the circumstances, will be barred by the doctrine of res judicata.*
>
> The essence of the timeliness determination, however, is whether the unions received such notice and opportunity to be heard as to satisfy the due process rights to be accorded persons so situated. The record shows that the district court entered the consent decree on August 27, 1979. We must assume that it determined that the settlement secured by the consent decree was fair, adequate and reasonable. *In reviewing the decree, the district court was undoubtedly aware that racial preference schemes are an accepted means of remedying past discrimination*

in our society. The only serious question before the district court would have been whether the stipulation of facts constituted a finding of past discrimination sufficient to justify the use of racial preferences at the expense of innocent persons. Although the entry of the consent decree does not constitute a finding of facts or a ruling of law, it is a determination of probability of success on the merits. Moreover, we note that none of the intervenors appear to have disputed the statistical evidence of racial discrimination in the employment and promotion practices of the defendant agencies. The stipulation of facts would have been a powerful and conclusive admission of the facts contained therein under Fed.R.Civ.P. 36(b). *Viewing these facts from a position considerably enhanced by our extensive exposure to the Massachusetts civil service system, we have no difficulty in upholding the district court's conclusion that plaintiffs enjoyed a substantial probability of success on the merits. We consider the prejudice flowing to the unions from denial of intervention to be as slight as the unions' probability of success on the merits of the issues they would raise upon intervention.*

Id. at 22-23, citations and footnote omitted. Absent some unusual circumstance, this holding in *Culbreath* must govern this case. I too find the prejudice to the plaintiffs flowing from denial of intervention to be as slight as their likelihood of success on the merits.

4. *The existence of some unusual circumstances militating either for or against intervention.*

This fourth and final consideration is at the heart of this case. The plaintiffs' argument is that the change in Title VII law made by *Stotts* is an unusual circumstance that requires

this Court to reconsider the validity of the consent decree. *See* Plaintiff's brief at 10. The basis of the present claim is as follows:

> As relates to the instant case, there can be no dispute that the *Culbreath* consent decree establishes racial quotas relative to the appointment of individuals to positions covered by the decree. In addition, the Stipulation of Facts in *Culbreath* indicates that the judicial authority for these quotas is founded on Title VII. Since . . . such quotas are no longer permissable [sic] under Title VII and since the Supreme Court has stated that the terms of a consent decree should be modified to reflect changes in applicable law, the *Culbreath* consent decree must be modified so as to eliminate the racial quotas and correspondingly any bar to the instant action.

Plaintiffs' brief at 9. This Court is therefore called upon to try to determine the scope of the holding in *Stotts*. I note that, to date, few other courts have faced this question.

The facts of *Stotts* are simple and familiar. The complaint in that case stated that officials of the City of Memphis were engaged in a pattern or practice of making hiring and promotion decisions on the basis of race in violation of Title VII of the Civil Rights Act and 42 U.S.C. §§ 1981 and 1983. The district court certified a class action and eventually approved a consent decree on April 25, 1980.

The decree adopted a long-term goal of increasing the proportion of minority representation in numerous job classifications. The City explicitly stated that it did not, by signing the decree, admit the allegations of the complaint concerning any violations of law. Neither the decree nor a prior, 1974 City-wide decree mentioned what was to happen in the event of

any layoffs or reductions in rank. Neither decree awarded any competitive seniority.

In 1981, projected budget deficits required the City to announce layoffs of nonessential personnel. These layoffs were to be made on the "last hired, first hired" [*sic*] rule applicable generally to all City employees. A black firefighter thereupon sought and received from the district court a temporary restraining order forbidding the layoff of any black employee. Shortly thereafter, the district court entered an injunction, noting that the decree did not contemplate the method to be used for reductions in rank or layoffs. The court explicitly found that the layoff policy was not adopted with any intent to discriminate, but that nonetheless it would have a racially discriminatory effect. The court ordered the City not to apply the seniority policy so as to decrease the percentage of black employees in several categories. Layoffs occurred in compliance with the injunction, and in some instances resulted in the layoff of non-minority employees with more seniority than minority employees.

The Court of Appeals for the Sixth Circuit affirmed, despite its conclusion that the district court was wrong in holding that the city's seniority system was not bona fide. On June 12, 1984, the Supreme Court reversed the judgment of the Court of Appeals.

The Supreme Court's discussion in *Stotts* is divided into two parts. Part A discusses the Circuit Court's finding that the injunction did no more than enforce the agreed-upon terms of the decree. The Court noted that the decree itself did not mention layoffs or demotions and there was no suggestion of any intention to depart from the existing system. In contrast, in the present case the express terms of the decree contemplate hiring conducted in exactly the way that occurred and for exactly the same reasons.

In the same part of the opinion, the *Stotts* Court at least implied that it still considered the affirmative action program instituted by the decree to be a permissible remedy under Title VII:

> The decree went on to provide the agreed-upon remedy, but as we have indicated, that remedy did not include the displacement of white employees with seniority over blacks. Furthermore, it is reasonable to believe that the "remedy", which it was the purpose of the decree to provide, would not exceed the bounds of the remedies that are appropriate under Title VII, at least absent some express provision to that effect.

Id., ___ U.S. ___, 104 S.Ct. at 2586. Had the Court meant to rewrite Title VII law to mean that all affirmative action programs are improper absent a finding of actual past discrimination, it would have said so here. *See Culbreath*, 630 F.2d at 23, *citing United Steelworkers v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979); *University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978); *United States v. City of Miami*, 614 F.2d 1322 (5th Cir.1980); *Boston Chapter NAACP, Inc. v. Beecher*, 504 F.2d 1017 (1st Cir.1974), *cert. denied*, 421 U.S. 910, 95 S.Ct. 1561, 43 L.Ed.2d 775 (1975); *Associated General Contractors of Massachusetts, Inc. v. Altshuler*, 490 F.2d 9 (1st Cir.1973), *cert. denied*, 416 U.S. 957, 94 S.Ct. 1971, 40 L.Ed.2d 307 (1974). The clear implication of the above language is that the actual remedy that was provided by the decree was valid and did not exceed the bounds of Title VII, although the subsequent displacement of white employees was invalid.

Part B of the Court's opinion discussed the authority of the district court to modify the consent decree in light of unex-

pected layoffs. The Court found that the City's seniority system was a bona fide plan that did not have as its purpose an intent to discriminate on the basis of race. The Court then went on to discuss a district court's authority to contravene the provisions of such a bona fide plan in order to enforce Title VII rights. The Court reiterated its ruling in *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) that a district court may award *competitive seniority* only when the beneficiary of the award has actually been a victim of illegal discrimination. The Court went on to support the holding in that case by referring to the legislative history of Title VII. It quoted or cited the remarks of Senators Humphrey, Ervin, Hill, Robertson, Smathers, Stennis, Tower, Clark, and Case. *Id.*, ___ U.S. ___, 104 S.Ct. at 2589-90. At least some of those remarks, as the plaintiffs in this case have pointed out, are extremely broad reaching. Read literally they could be interpreted to require a finding of actual discrimination prior to entry of *any* affirmative action plan. The context of the Court's discussion, however, is a consideration of competitive seniority award. The Court did not question the validity of the underlying decree. Had the Court intended to radically change its interpretation of Title VII law so as to require a finding of actual discrimination in *any* affirmative action case, I believe it would have said so. In the absence of clearer authority, I decline to read such an expansive meaning into an opinion limited to a discussion of layoffs made in violation of a bona fide seniority system. The plaintiffs here seek too broad a rule from too narrow a set of facts.

[2, 3] In short, neither Part A nor Part B of the *Stotts* opinion supports the plaintiffs' claim in this case that Title VII law has so substantially changed as to invalidate the *Culbreath*

consent decree. *Stotts* is simply inapplicable to this case.[2] It therefore cannot form the kind of unusual circumstance that would militate in favor of granting a motion to intervene. As a result, I find that the plaintiffs' attempt to intervene in the *Culbreath* case by means of this complaint is untimely and must be denied. *See Culbreath*, 630 F.2d at 24. The defendants' motion to dismiss for failure to state a claim is therefore granted.

[4] Although the motion of the Class to intervene in this case might be considered moot in light of the above ruling, I consider the motion because the Class may wish to participate in any appellate review of this order. I find that the Class has a significant interest in the outcome of this action and that resolution of the case in favor of the plaintiffs would have a substantially adverse impact on the interests of the Class. I further find that the present state defendants cannot adequately represent the interests of the Class in this case. The motion to intervene is therefore allowed.

CONCLUSION

For the reasons stated above, the motion of the defendants to dismiss the case for failure to state a claim is allowed. The motion of the Class to intervene is allowed.

SO ORDERED.

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[2] I note that the Third Circuit recently discussed the continuing legality of an affirmative action program controlling the hiring of teachers in the Philadelphia public school system. *Kromnick v. School District of Philadelphia*, 739 F.2d 894 (3d Cir.1984). The opinion in that case implies that the court believed the holding in *Stotts* to be limited to situations involving seniority plans. *Id.* at 909-912. This decision by a Court of Appeals reinforces my belief that *Stotts* is inapplicable to the present case.

Appendix C.

AMENDMENT XIV.—CITIZENSHIP: PRIVILEGES AND IMMUNITIES: DUE PROCESS: EQUAL PROTECTION: APPORTIONMENT OF REPRESENTATION: DISQUALIFICATION OF OFFICERS: PUBLIC DEBT: ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 § 2000e

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allow-

able. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

Supreme Court, U.S.
FILED
OCT 16 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-492

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT T. DEVEREAUX, et al.
Petitioners-Appellants,

v.

WILLIAM J. GEARY, et al.
Respondents-Appellees.

and

PLAINTIFF-CLASS IN CULBREATH v. DUKAKIS
Intervenors, Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

OPPOSITION OF THE INTERVENORS - APPELLEES TO THE PETITION FOR CERTIORARI

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PLAINTIFF-CLASS IN CULBREATH v. DUKAKIS

BEST AVAILABLE COPY

No. 85-492

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT T. DEVEREAUX, et al.
Petitioners-Appellants,

v.

WILLIAM J. GEARY, et al.
Respondents-Appellees.

and

PLAINTIFF-CLASS IN CULBREATH v. DUKAKIS
Intervenors, Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

OPPOSITION OF THE INTERVENORS - APPELLEES TO THE PETITION FOR CERTIORARI

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ATTORNEYS FOR THE INTERVENORS-APPELLEES,
PLAINTIFF-CLASS IN CULBREATH v. DUKAKIS

QUESTIONS PRESENTED FOR REVIEW

I. CAN THE PETITIONERS CHALLENGE THE VALIDITY OF THE COLLATERAL ATTACK DOCTRINE WHEN THEIR COMPLAINT WAS TREATED AS A MOTION TO INTERVENE AND THEY WERE GIVEN THE OPPORTUNITY TO BE HEARD ON THE MERITS OF THEIR CLAIMS?

II. DOES THE FOURTEENTH AMENDMENT PERMIT AN EMPLOYER WHO HAS ADMITTED PAST PRACTICES OF DISCRIMINATION TO ENTER INTO A CONSENT DECREE WHICH PROVIDES FOR RACE-CONSCIOUS PROSPECTIVE RELIEF?

III. DOES TITLE VII PERMIT AN EMPLOYER WHO HAS ADMITTED PAST PRACTICES OF DISCRIMINATION TO VOLUNTARILY ENTER INTO A CONSENT DECREE WHICH PROVIDES FOR RACE-CONSCIOUS PROSPECTIVE RELIEF?

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STATEMENT OF THE CASE

On July 1, 1971, the plaintiffs, intervenors ("the Class"), asserting claims pursuant to the fourteenth amendment of the United States Constitution, 42 U.S.C. §1981 and 42 U.S.C. §1983, filed a class action Jackson et al. v. Sargent, et al. [now Culbreath v. Dukakis] on behalf of minority residents of the City of Boston alleging that the then Governor, the Civil Service Commission and various state agencies had engaged in racial discrimination in their employment and promotional practices.

On December 18, 1978, after two years of negotiations, the Class and the defendants submitted a proposed Consent Decree and a Stipulation of Facts to the Court. In that stipulation the parties stated:

> "The parties believe that the stipulation of facts

> set forth below and acknowledged by the Court constitute findings of such past practices of discrimination of both a judicial and administrative nature, sufficient to sustain under Title VII of the Civil Rights Act of 1964, thereby providing sufficient grounds for the remedies set forth in the Decree.

The Stipulation which was signed by the Governor, the Attorney-General and the heads of each of the defendant agencies, further stated that the statistics demonstrated a racially disproportionate underemployment of minorities in most job classifications and that the defendants have in the past and continue to have engaged in numerous non job related employment practices which have caused the racially disproportionate underemployment of minorities. The Consent Decree which lasts for eight

years, requires the defendants to cease the use of discriminatory employment practices, undertake increased recruitment of minorities and to employ an increasing number of minorities over the term of the decree.

On August 27, 1979, the trial court denied motions to intervene brought by a number of unions representing employees holding positions covered by the Consent Decree on the basis that they were untimely. On August 30, 1979, the trial court signed and entered the Stipulation of Facts, signed and entered the Consent Decree, and retained jurisdiction of the matter. The parties who sought to intervene filed timely notices of appeal.

The denials of intervention were upheld by the United States Court of Appeal for the First Circuit,

Culbreath v. Dukakis, 630 F.2d. 15 (1st Cir. 1980). In reviewing the Consent Decree, the First Circuit determined that the Consent Decree was fair, adequate, reasonable and lawful, and that racial preference schemes were accepted means of remedying past discrimination relying on United Steelworkers of America v. Weber, 443 U.S. 193 (1979); University of California v. Bakke, 438 U.S. 265 (1978).

On July 12, 1984, the petitioners, five white males, employed by the Metropolitan District Commission ("MDC"), filed the present action pursuant to the fourteenth amendment and 42 U.S.C. §1981 seeking to undo the appointment under the terms of the Consent Decree, of a black male, Donald Callender, to a provisional position as a Captain with the MDC. In their Complaint the petitioners simply alleged

that they had "been denied the opportunity to be considered for the position," and that because of their race, one of them had been denied the position. The petitioners did not allege that Callender was not qualified or eligible to fill the position. Further, the petitioners did not allege that the appointment of Callender violated the existing seniority system or that it contravened any existing collective bargaining agreement between the petitioners and the defendants.

Both the First Circuit and district Court treated the petitioners' complaint as a motion to intervene in Culbreath v. Dukakis. In addressing the issues of the timeliness of this attempt to intervene, the First Circuit found that but for the decision of the United States Supreme Court in Firefighters Local Union No. 1784 v. Stotts ___

U.S. ___, 104 S. Ct. 2576 (1984), the facts before the district court were virtually identical to those before the First Circuit in 1980. The First Circuit and the district court rejected the petitioners' argument that there was an unusual circumstance created by a change of Title VII law based on Stotts. Both the First Circuit and the district court found that Stotts was inapplicable in that Stotts dealt with a court's power to modify a consent decree over the objection of one of the parties and with a court's power to enjoin the operation of a bona fide seniority system during a time of layoffs. Neither of these issues were before the district court. A further distinction that the First Circuit made was that the parties had stipulated that discriminating patterns and practices existed that were sufficient to support

a Title VII action and that the petitioners challenged provisions to which the original parties had agreed. The First Circuit and district court rejected the petitioners' contention that the Court meant to rewrite Title VII law to make affirmative action programs improper absent a finding of actual past discrimination. The First Cicuit concluded that absent an express announcement to the contrary, Weber remains good law.

SUMMARY OF ARGUMENT

The present action is a direct attack upon the goals of the Consent Decree and the mechanisms agreed upon to achieve those goals. Because the present action directly attacks and attempts to undo the remedial aspects in Culbreath, the action is an impermissible collateral attack on the

Consent Decree and the district court correctly dismissed the Complaint. Thaggard v. City of Jackson, 687 F.2d 66, 68 (5th Cir. 1982), cert. denied sub. nom. Ashley v. City of Jackson, _____ U.S. ____, 104 S.Ct. 255 (1983); Dennison v. City of Los Angeles Department of Water and Power, 658 F.2d 694 (1981).

As the Complaint is an impermissible collateral attack, the district court and First Circuit correctly chose to treat it not as a separate complaint but as an attempt to intervene in that action. Treated as a motion to intervene, intervention was untimely since the factual issues raised by such an effort to intervene have already been determined. Dukakis v. Culbreath, 630 F.2d 15 (1st Cir. 1980). Since the district Court and the First Circuit heard petitioners' claims in the

context of a motion to intervene, the petitioners did not suffer any due process violation, were not harmed and have no basis to raise the validity of the collateral attack doctrine.

The petitioners' contention that the decision of the United States Supreme Court in Firefighters Local Union No. 1784 v. Stotts, ____ U.S. _____, 104 S.Ct. 2576 (1984) makes invalid the Consent Decree is incorrect. At issue in Stotts was the legality of an order which modified an existing consent decree where there had been no admission or finding of racial discrimination and which resulted in the termination of the employment of non-minorities in a manner which violated an existing seniority system. In setting aside the modification to the consent decree, the Court did not set aside the underlying Consent Decree

which provided for race-conscious selection and provided prospective relief for unproven victims of discrimination. Nor did the Stotts decision directly or implicity overrule a long line of cases under the fourteenth amendment and Title VII in which it and numerous Circuit Courts of Appeal have upheld remedial race-conscious plans implemented either through agreement or consent decree.

The present case is dramatically different than Stotts. Not only have there been conclusive admission of facts of discrimination, the terms of the Consent Decree mandate that an alternate list be used only when the defendants have failed to meet hiring goals contained in the Consent Decree. The use of the alternate list did not require the termination of the employment of a non-minority, did not

interfere with an existing seniority system, and simply resulted in the employment of a qualified minority in an voluntary effort (albeit entered under the threat of litigation) by the defendants to undo the effects of years of racial discrimination.

ARGUMENT

I. THE DUE PROCESS RIGHTS OF THE PETITIONERS WERE NOT VIOLATED WHEN THE DISTRICT COURT AND THE COURT OF APPEALS TREATED THEIR COMPLAINT AS A MOTION TO INTERVENE IN THE UNDERLYING ACTION.

There is good reason for the collateral attack doctrine and that is to protect the parties to a consent decree from inconsistent or contradictory proceedings. See e.g., Thaggard v. City of Jackson 687 F.2d 66 (5th Cir. 1982), cert. denied sub. nom. Ashley v. City of Jackson, ____ U.S. _____, 104 S.Ct. 255 (1983);

Dennison v. City of Los Angeles Department of Water and Power, 658 F.2d 694 (9th Cir. 1981); O'Burn v. Shapp, 70 F.R.D. 549 (E.D.Pa. 1976), aff'd. without published opinion, 546 F.2d 418 (3rd Cir. 1976), cert. denied, 430 U.S. 968 (1977). In seeking a review of the collateral attack doctrine the petitioners contend that the doctrine violates their due process rights. In making such an argument, the petitioners ignore the fact, that by treating their complaint as a motion to intervene the district court specifically allowed them to be heard on the merits of their claims that their constitutional rights had been violated by the operation of the Consent Decree.

If the petitioners' position were adopted, then each time a minority was advanced, a different non-minority would have the opportunity to initiate

an attack on the Consent Decree by a separate lawsuit. To permit repeated attacks "would severely undercut important notions of judicial efficiency," Thaggard v. City of Jackson, 687 F.2d at 69, and would undermine the finality and integrity of the settlement process. Grann v. City of Madison, 738 F.2d 786, 794 (7th Cir. 1984) cert. denied, ___ U.S. ___, 105 S.Ct. 296 (1984); Smith v. Missouri Pacific Railroad Company, 615 F.2d 683 (5th Cir. 1980). Even if the petitioners had been permitted to file a separate action the only issue they could have raised was the effect of the Stotts case. Therefore, as long as a party has the right to attempt to intervene, there is simply no harm to the constitutional right of these parties or any other party to be heard.

II. The Consent Decree is Valid Since the Fourteenth Amendment Allows for Race Conscious Relief Absent a Showing of Identifiable Victims.

The petitioners' position ignores the rulings in University of California v. Bakke, 438 U.S. 265 (1978). In Bakke, the Supreme Court invalidated the University of California's race-conscious preferential admissions program as violating Title VI of the Civil Rights Act of 1964, which the Court considered to be coextensive with the fourteenth amendment. 438 U.S. at 287. However, the Court in Bakke clearly establishes the principal that under the fourteenth amendment the state has a legitimate and substantial interest in ameliorating or eliminating the effects of identified discrimination. 438 U.S. at 307. These preferences may be imposed where a legislative or administrative body has

made findings of constitutional or statutory violations. 438 U.S. at 301. Even absent a determination of discrimination a public agency may, without violating the fourteenth amendment, take into consideration racial classifications which are designed to further remedial purposes as long as they serve important governmental objectives and are related to those objectives. 438 U.S. at 316-319. In his plurality opinion, Justice Powell noted that "this case does not call into question congressionally authorized administrative actions, such as consent decrees under Title VII or approval of reapportionment plans under §5 of the Voting Rights Act of 1965...." Id. at 302 n.41. Moreover he agreed with Justices Brennan, White, Marshall and Blackman that neither Title VI nor the

fourteenth amendment raised an absolute bar to the use of race in university admissions. Id. at 325-326 (Brennan J., concurring in part and dissenting in part). Finally, Justice Brennan argued, based on his analysis of several school desegregation cases, that prospective race-conscious "relief does not require as a predicate proof that recipients of preferential advancement have been individually discriminated against, it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination. Id. at 363.

In Fullilove v. Klutznick, 448 U.S. 448 (1980), this court reaffirmed that governmental remedial programs which are race-conscious do not necessarily violate the equal protection component of the Due Process Clause of the Fifth Amendment. At issue was a

"minority business enterprise" (MBE) provision of the Public Works Employment Act of 1977 which required that at least ten percent of federal funds granted for local public works projects be used by the state or local grantee to procure goods and services from businesses owned by minority group members. The Court held that where Congress had the authority to act to remedy the effects of past discrimination, equal protection does not require it to "act in a wholly color-blind fashion." Id. at 482. Additionally, the Court stated that the fact that some non-minority business enterprises may be innocent of any past discriminatory conduct was not controlling because the purpose of the MBE program is to remedy the present effects of the virtual exclusion of minority firms from contracting opportunities because of which

non-minority firms may have in the past reaped competitive benefit. Id. at 485. Finally, the MBE program was constitutional even though it might disappoint the expectations of non-minority firms because "[w]hen effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible." Id. at 484. Significantly, the Fullilove court did not require that Congress first find that the individual recipients of the MBE program had individually been discriminated against as a predicate for race-conscious relief. Remedying the effects of past discrimination is sufficient reason for the race-conscious program. Id. at 496 (Powell, J., concurring). Thus Bakke and Fullilove make clear that governmental

race-conscious remedial action, even in the absence of a showing of actual individual victims, is permissible under the fourteenth amendment. The petitioners point to no case which has expressly either overruled or limited the scope of Bakke and Fullilove. The Circuit Courts have also affirmed the constitutionality of race-conscious remedies on a number of occasions. See Boston Chapter, NAACP v. Beecher, 679 F.2d 965 (1st Cir. 1982); Janowiak v. Corporate City of South Bend, 750 F.2d 557, 563-4 (7th Cir. 1984); Bratton v. City of Detroit, 704 F.2d 878 (6th Cir. 1983); cert. denied, _____ U.S. ____, 104 S. Ct. 703 (1984); Valentine v. Smith, 654 F.2d 503 (8th Cir. 1981), cert. denied, 454 U.S 1124 (1981); Bushey v. New York State Civil Service

Commission, 733 F.2d. 220 (2nd Cir., 1984) cert. denied, _____ U.S. _____, 105 S. Ct. 803 (1985).

III. Firefighters Local Union No. 1784 v. Stotts Does Not Affect the Validity of the Culbreath Consent Decree.

As the circuit court stated, what is at the heart of this case is the petitioners' claim that the United States Supreme Court's decision in Firefighters Local Union No. 1784 v. Stotts, ____ U.S. ____, 104 S.Ct. 2576 (1984) is applicable to the present case. There is, however, nothing in Stotts which is relevant or applicable to the case at bar.

In Stotts, the United States District Court for the District of Tennessee had previously approved a consent decree which provided for remedial race-conscious hiring relief and did not modify or overturn the

existing seniority system. At the request of the plaintiffs the court entered a preliminary injunction modifying the consent decree and enjoining the Memphis Fire Department from following its seniority system in determining who would be laid off as a result of a budgetary shortfall. When layoffs were carried out pursuant to this order, it resulted in white employees with more seniority than black employees being laid off. The seniority system in its original state would have resulted in the layoff of black employees with less seniority. On appeal, the Sixth Circuit affirmed, holding that the district court's preliminary injunction was proper and that it had acted correctly in modifying the consent decree.

The central issue before this Court was whether the preliminary injunction was justified either as an

effort to enforce the consent decree or as a valid modification of the consent decree. The Court reversed and held that the district court's preliminary injunction was not justified either as an effort to enforce the consent decree or as a valid modification of the consent decree. Central to the Court's holdings were the following arguments: (a) because the consent decree contained no provision regarding layoffs or any provision suggesting any interest to depart from the existing seniority system, the injunction could not be justified as an attempt to enforce the decree; and (b) the attempted modification was not valid because it was an unlawful attempt to abrogate the terms of a bona fide seniority system protected by Section 703(h) of Title VII without a prior finding of discriminatory intent and to the

detriment of non-minority workers. It is important to emphasize that Stotts dealt only with terminations in light of a bona fide seniority plan and not with prospective race-conscious affirmative relief.

The distinctions in this case are critical. First, the action which is challenged is mandated by the Consent Decree, was contemplated by the parties and is neither a result of a modification of the Decree nor the result of an injunction seeking to enforce a provision of the Decree. Second, there has been a clear admission by the defendants to the Consent Decree of the intentional use of discriminatory employment practices resulting in significant underrepresentation of minorities in the defendant state agencies. Third, the promotion of Callender does not impinge or violate

the rights of the petitioners or for that matter of any individual under the existing seniority system. Fourth, neither the petitioners nor any other individual are losing a position which they presumably have nor are they facing a reduction in salary. Fifth, the actions complained of were mandated, in part, by the collective bargaining agreements in place at the time that the Decree was implemented. Culbreath v. Dukakis, 630 F.2d at 24. Sixth, the Consent Decree does not bar the promotions of non-minorities. Seventh, the terms of the Consent Decree are limited in duration and no one has questioned the reasonableness of those terms. Lastly, none of the parties to the Consent Decree have objected to the operation of any of its terms.

The petitioners insist that Stotts creates a significant and

dramatic change in the Title VII law, namely that Section 706(g) of Title VII proscribes all race-conscious remedies except for those which are limited to actual victims of past discrimination. However, the Stotts Court neither addressed nor ruled upon such a broad issue. Rather, as noted above, the Stotts Court faced the more limited issue of the lawfulness of the abrogation of a bona fide seniority system by a court imposed race-conscious remedy. In deciding this issue the Stotts Court did not condemn race-conscious remedies imposed in any context other than Section 706(g) of Title VII and did not forbid voluntary race-conscious plans such as the one it approved of in United Steelworkers of America v. Weber, 443 U.S. 193 (1979). In short, Stotts stands for the narrow proposition that a Court may not,

against the wishes of any party, modify a consent decree by adding a provision never agreed to by the parties which abrogated the layoff provisions of a bona fide seniority system at the expense of non-minorities. It is significant that the Stotts Court did not even hint that the 50% hiring goal and the 20% promotion goal, contained in the Stotts consent decree, were in any way impermissible under Title VII.

The petitioners have ignored the import of those lines of cases which permit an employer, both public and private, to take into consideration race-conscious decisions under Title VII.

In United Steelworkers of America v. Weber, the Supreme Court sustained a voluntarily adopted affirmative action plan. The court stated that the question was not what

Title VII requires or what a court might order to remedy a Title VII violation, but rather what voluntary actions might be lawfully be taken under Title VII. Weber at 200. In its decision, the Court held that voluntary efforts to undo racial imbalances was permissible under Title VII, notwithstanding the absence of any finding of intentional discrimination or identification of actual victims. It was sufficient that there be "conspicuous racial imbalance in traditionally segregated job categories" Weber at 209. The court articulated the standard to be used in determining the reasonableness of a racial preference plan to be whether the plan is of limited duration, whether it unnecessarily tramelled the interests of non-minorities and whether it is substantially related to the purpose of remedying the effects of

discrimination. Id. at 208. Since Weber, all of the Circuit Courts have upheld voluntarily adopted affirmative action plans of private parties and of state and local governments and agencies in cases similar to Weber as well as in cases involving consent decrees. See e.g., Van Aken v. Young, 750 F.2d 43 (6th Cir., 1984); Diaz v. American Telephone & Telegraph, 752 F.2d 1356 (9th Cir., 1985); Kromnick v. School District of Philadelphia, 739 F.2d 894 (3d Cir., 1984), cert. denied, 105 S. Ct. 782 (1985); Bushey v. New York Civil Service Commission, 733 F.2d 220 (2d Cir., 1984), cert. denied, _____ U.S. _____, 105 S. Ct. 803 (1985). Similarly, in the cases which have been decided subsequent to Stotts a number of courts have agreed with the district court and circuit court and rejected the argument that Stotts barred prospective

race-conscious relief in Title VII cases. See e.g., Turner v. Orr, 759 F.2d 817, 823-826 (11th Cir. 1985); Vanguards of Cleveland v. City of Cleveland, 753 F. 2d 479 (6th, 1985) cert. granted _____ U.S. _____ (1985).

CONCLUSION

For all of the above reasons, the petitioners' petition for certiorari does not present matters which warrant review by this Court and the petition should be denied.

PLAINTIFF-CLASS IN CULBREATH
v. DUKAKIS

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Petitioners-Appellants

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Respondents-Appellees

ON PETITION FOR WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

BRIEF OF STATE RESPONDENTS-APPELLEES IN OPPOSITION

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QUESTIONS PRESENTED

1. Did this Court's opinion in Firefighters Local Union No. 1784 v. Stotts, effect such a clear change in Title VII law that a lower court abused its discretion by denying non-minorities intervention to contest an affirmative action consent decree?
2. Can a separate action by aggrieved third parties be sustained as a collateral attack on a race-conscious affirmative action consent decree?

PARTIES

This Brief in Opposition is submitted on behalf of the State Respondents-Appellees: Massachusetts Metropolitan District Commission Commissioner William J. Geary, and Superintendent Thomas E. Keough.

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NO. 85-492

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ROBERT T. DEVEREAUX, et al.,

Petitioners-Appellants

v.

WILLIAM J. GEARY, et al.,

Respondents-Appellees

ON PETITION FOR WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

BRIEF OF STATE RESPONDENTS-APPELLEES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 1a-15a) is reported at 765 F.2d 268 (1st Cir. 1985). The opinion of the

District Court (Pet. 16a-29a) is reported at 596 F. Supp. 1481 (D. Mass. 1984).

JURISDICTION

The judgment of the Court of Appeals was entered on June 24, 1985. The petition for certiorari was filed on September 19, 1985. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case presents a question of the correct interpretation of the remedial section of Title VII of the Civil Rights Act of 1964, §706(g), as amended, 42 U.S.C. §2000e-5(g) ("Section 706(g)"), reproduced in the petition for certiorari at 30a-31a.

STATEMENT OF THE CASE

1. The petitioners, five white police lieutenants employed by the Metropolitan District Commission ("MDC"), seek to invalidate an affirmative action consent decree. Their effort is based upon their reading of this Court's decision in Firefighters Local Union No. 1784 v. Stotts, ___ U.S. ___, 104 S. Ct. 2576 (1984). Specifically, they challenge the promotion of a black MDC police lieutenant to captain under the terms of a 1979 consent decree entered in Culbreath v. Dukakis, C.A. No. 74-2463-MA (D. Mass.) ("Culbreath decree"). (Pet. 5). That decree, adopted under the conditions set forth below, establishes goals for the hiring and promotion of minority employees within the MDC and four other state agencies in the Massachusetts civil service workforce.

2. In 1974, minority civil service applicants and employees filed a class action pursuant to 42 U.S.C. §§1981 and 1983,[1/] which challenged alleged historical and ongoing discriminatory hiring and promotional practices in the state civil service. (Pet. 3, 4a).[2/]

1/ The plaintiffs' claims in that action were not grounded on Title VII, nor did they allege intentional discrimination. However, prior to resolution of the suit by entry of a consent decree, this Court ruled in Washington v. Davis, 426 U.S. 229 (1979), that plaintiffs must prove intentional discrimination to recover in §1981 and §1983 actions. The parties thus treated the action as one brought pursuant to Title VII, and the consent decree was entered under that statute. 765 F.2d at 270; Pet. 4a n. 1.

2/ That action was initially brought as Jackson v. Sargent, C.A. No. 74-2463-F (D. Mass). One of the original plaintiffs was dismissed from the suit for lack of standing, since he had not actually applied for a civil service position. Jackson v. Sargent, 394 F. Supp. 162 (1975). The dismissal was affirmed in Jackson v. Dukakis, 526 F.2d 64 (1st Cir. 1975).

The plaintiff class was certified and, in December of 1978, state officials entered into a series of factual stipulations[3/] and a consent decree with representatives of the class in settlement of that suit (Pet. 3), and to increase the number of minority civil service employees in the state agencies. That decree was approved and entered by the District Court on August 27, 1979. Culbreath v. Dukakis, C.A. No. 74-2463-MA (D. Mass.). The Culbreath decree sets goals for the appointment and promotion of minorities in civil service job grades

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3/ The factual stipulations set forth in the Culbreath decree, establishing a statistically disproprotionate underemployment of minorities, were acknowledged by the parties to constitute "findings of such past practices of discrimination of both a judicial and administrative nature, sufficient to sustain an action under Title VII of the Civil Rights of 1964 . . . ." (Pet. 3, 4a).

one through twenty in agencies within the Boston Standard Metropolitan Service Area for a period of eight years, commencing in January of 1979 and terminating in December of 1987. (Pet. 4a-5a, 18a).

In late 1978 and early 1979, after negotiations for the Culbreath decree were completed but prior to its entry by the District Court, several unions allegedly affected by the proposed decree's provisions moved to intervene in that action. The District Court denied such intervention, and the Court of Appeals affirmed. Culbreath v. Dukakis, 630 F.2d 15 (1st Cir. 1980); Pet. 5a.

3. The current, underlying action was brought upon a new complaint by the petitioners against the Commissioner of the MDC and the Superintendent of the

MDC police force ("the state respondents") on July 16, 1984, to compel them to promote one of the petitioners in accordance with state civil service law. They alleged reverse discrimination by MDC officials in promoting a black MDC police lieutenant to captain in July 1984, pursuant to provisions of the Culbreath decree. (Pet. 5, 6a, 19a).[4/]

4/ The two non-minority lieutenants ranking first and second on an eligible promotional civil service list had been promoted to captain by the MDC prior to this suit. The five petitioners tied for the third through fifth positions on the list. The black lieutenant promoted was ranked sixth, and was the only minority candidate on an alternate list for promotion in accordance with provisions of the Culbreath decree. (Pet. 5).

While the petitioners assert that state civil service law mandates that one of the top three candidates on a list be promoted (Pet. 5n), that is not entirely accurate. State law also

(footnote continued)

The Culbreath plaintiff class moved successfully to intervene as defendants in this action, and all defendants moved to dismiss. (Pet. 6a, 20a). On November

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(footnote continued)

provides that candidates for promotion ranking highest on a list may be passed over by an appointing authority under certain circumstances. See M.G.L. c. 31, §27. Since that analysis was not necessary in the instant case where a minority was promoted, it has never been determined as a factual matter if any of the petitioners would have been promoted even in the absence of the Culbreath decree. As the courts have observed on more than one occasion, "the interest that a police officer has in a promotion by reason of his position on an eligible list does not rise to the level of a property interest" entitled to constitutional protection. Hussey v. Sullivan, 498 F. Supp. 594, 596-97 (D. Mass. 1980), aff'd, 651 F.2d 74 (1st Cir. 1981); see also Bishop v. Wood, 426 U.S. 341, 345, n. 8 (1976); Burns v. Sullivan, 619 F.2d 99, 104 (1st Cir. 1980). Finally, the Eleventh Amendment bars the petitioners from invoking the power of the federal courts to compel the state respondents to comply with state civil service law. Pennhurst State School and Hospital v. Halderman, ___ U.S. ___, 104 S. Ct. 900 (1984).

13, 1984, the District Court allowed the motions to dismiss, characterizing the petitioners' claims as a belated request to intervene in the Culbreath decree, rather than as a separate collateral attack on that decree. (Pet. 6, 6a-7a). The petitioners appealed.

On June 24, 1985, the Court of Appeals entered judgment affirming the District Court. Consistent with the lower court, the Court of Appeals treated the petitioners' separate action as an attempt to intervene in Culbreath, and found that this Court's decision in Stotts did not constitute such a clear change in Title VII law as to render the denial of intervention an abuse of the District Court's discretion. (Pet. 6, 1a-15a).

REASONS FOR DENYING THE WRIT

The petitioners' claims are twofold. First, they wish to intervene in an eight-year consent decree entered in 1979, asserting that this Court's decision in Firefighters Local Union No. 1784 v. Stotts effected such a significant change in Title VII law as to warrant intervention. Alternatively, they attempt to attack the decree collaterally, on the grounds that constitutional due process and principles of res judicata and collateral estoppel mandate that a non-party cannot be bound by an earlier decision. For the reasons stated below, the petitioners are wrong on both counts. Since this Court has granted certiorari to hear arguments this term in several cases which together are likely to resolve the issues raised in the present

petition, it is unnecessary to review this case as well.

I. THE COURT OF APPEALS' DECISION THAT THERE HAS BEEN NO CLEAR CHANGE IN TITLE VII LAW WAS CONSISTENT WITH DECISIONS OF ALL OTHER CIRCUIT COURTS, INCLUDING THOSE AFFIRMATIVE ACTION CASES IN WHICH CERTIORARI HAS BEEN GRANTED THIS TERM.

In its decision, the Court of Appeals agreed with the District Court that "Stotts (which dealt with a different situation) does not make it clear that the challenged consent decree is no longer lawful. The weight of circuit authority construes Stotts as not invalidating such a decree." 765 F.2d at 269; Pet. 3a. Since the Stotts decision did not so clearly define a federal court's remedial authority under Title VII, the Court of Appeals was correct

in denying the petitioners relief by vacating the Culbreath decree.

While the petitioners cite language in Stotts to advance their position that only actual victims of discrimination can obtain Title VII relief, they can point to no subsequent judicial decisions to buttress that interpretation. In this case, the Court of Appeals followed the lead of all other circuit courts which have dealt with Stotts challenges to existing consent decrees, and have held that Stotts does not affect their continuing validity.

Significantly, this Court has granted certiorari to hear arguments this term in three cases involving affirmative action. Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479 (6th Cir. 1985), cert. granted sub nom, Local

No. 93, International Association of Firefighters v. City of Cleveland, ___ S. Ct. ___, 54 U.S.L.W. 3223 (October 8, 1985) (No. 84-1999); Wygant v. Jackson Board of Education, 746 F.2d 1152 (6th Cir. 1984), cert. granted ___ U.S. ___, 105 S. Ct. 2015 (1985); Local 638 v. Equal Employment Opportunity Commission, 753 F.2d 1172 (2nd Cir. 1985), cert. granted, ___ S. Ct. ___, 54 U.S.L.W. 3223 (October 8, 1985) (No. 84-1656).

In Vanguards, supra, a union challenged an affirmative action consent decree entered in settlement of class action litigation, asserting that it penalized innocent non-minority firefighters under the Fourteenth Amendment. Analyzing the merits of its claim under Title VII, the Sixth Circuit held that for the plan embodied in the consent

decree to be valid, it must be reasonably related to the objective of remedying prior discrimination, allow only qualified minorities to be hired or promoted, not require the discharge and replacement of non-minority workers or create an absolute bar to their advancement, and must be temporary in nature and terminate when the underrepresentation of minorities has been corrected. 753 F.2d at 484, citing Williams v. Vukovich, 720 F.2d 909, 920 (6th Cir. 1983). Those same terms are met in the Culbreath decree.

Like the Court of Appeals in the present case, the Sixth Circuit in Vanguards held that Stotts was distinguishable as a matter of law, since it involved a court order entered over the objections of the public employer and outside the scope of the consent decree

itself. 753 F.2d at 486. Examining the extent to which Stotts may have defined the remedial relief available under Title VII, §706(g), the Sixth Circuit concluded that, while Stotts clearly limits the relief which a court may order, it does not forbid an employer from entering into a consent decree. Id. at 487.

Similarly, in Wygant, supra, the same circuit court upheld a voluntary race-conscious affirmative action plan developed during the collective bargaining process. Stating that the majority in Stotts "specifically declined" to decide the validity of such a plan, 746 F.2d at 1158, the court found that it did not violate the equal protection clause or Title VII even in the absence of direct findings of discrimination.

In Local 638, supra, the trial court's imposition of an affirmative action plan on a union after trial was affirmed by the Second Circuit. That court rejected the argument "that Stotts eliminates all race-conscious relief except that benefitting specifically identified victims of past discrimination."

The court distinguished Stotts on the grounds that its discussion of §706(g) related only to "make whole" relief ordered by the district court, and did not address the type of prospective relief ordered in Local 638. 753 F.2d at 1185-1186.

Other circuits have distinguished Stotts on that point as well. See Grann v. City of Madison, 738 F.2d 786, 795, n. 5 (7th Cir. 1984) (Stotts concerned with power of district court to modify decree over city's objection where no

finding of actual discrimination, yet "did not hold that non-minority employees can attack a consent decree that remedies the effects of proven discrimination");[5/] Diaz v. American Telephone and Telegraph Co., 752 F.2d 1356, 1360 n.5 (9th Cir. 1985) (Stotts does not undermine group-rights goals of Title VII, but holds that court may not modify preexisting consent decree to divest another group of employees of entitlements under bona fide seniority system).

It is clear that the Court of Appeals' decision in this case was in line

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5/ See also Britton v. South Bend School Corporation, 35 F.E.P. Cases 1527, 1531 (N.D. Ind. 1984) (affirmative action plan forbidding minority layoffs, incorporated into both collective bargaining agreements and "consent order" entered as settlement in prior action, "reasonable" under Fourteenth Amendment).

with those of other circuits in upholding affirmative action decrees in the aftermath of Stotts. As the court noted, whether a majority of this Court would go so far as to outlaw the race-conscious affirmative action decree in the present case "is not easy to determine from the plurality opinion in Stotts. . . ." 765 F.2d at 274.

While there has yet been no dissension among the circuits concerning the impact of Stotts on affirmative action consent decrees, it is indeed possible that the Wygant decision may "shed more light in this area." 765 F.2d at 275. In fact, the broad spectrum of race-conscious affirmative action plans considered in the three cases in which certiorari has already been granted, will certainly ensure any necessary clarification of Stotts. Of the three, Vanguards is

closest factually to the present matter in that it questions the authority of a federal court, under §706(g) of Title VII, to enter a consent decree in settlement of class action litigation.

In sum, it is clear that the Court of Appeals made the correct decision to leave the Culbreath decree intact pending further guidance. Whatever action this Court takes in Vanguards, Wygant and Local 638, those decisions are likely to have a profound impact on the merits of this and other pending cases. To this end, it would be in the interests of all parties for this Court to hold the petition for certiorari in this action pending their outcome.

II. THIS CASE DOES NOT WARRANT REVIEW OF THE COLLATERAL ATTACK DOCTRINE.

While the petitioners urge this Court to grant certiorari to "lay to rest" the collateral attack doctrine (Pet. 12), such a grant is unnecessary. First, there is no significant split among the circuit courts concerning either the constitutionality of that doctrine or its consistency with the procedural doctrines of issue preclusion. Even more important, just as this Court need not reach the collateral attack question, neither the District Court nor the Court of Appeals relied on that doctrine to dispose of the petitioners' claims in this case. Since this Court's decisions in Vanguards, Wygant and Local 638 are likely to resolve the validity of a race-conscious affirmative action decree, and thus the merits of this

action, it is unnecessary to hear the petitioners' collateral attack claims. Nevertheless, the state respondents address those claims below.

As this Court has noted in criminal matters, the strong interest in preserving the finality of judgments must be overcome before collateral relief can be justified. Henderson v. Kibbe, 431 U.S. 145, 154 n. 13 (1977), citing Schneckloth v. Bustamonte, 412 U.S. 218, 256-266 (1972) (Powell, J., concurring). Indeed, a final judgment is presumed valid, and will withstand such attack unless the lower court lacked jurisdiction. Hill v. United States, 284 F.2d 754, 756 (9th Cir. 1960), cert. denied, 365 U.S. 873, cert. denied, 368 U.S. 995, cert. denied, 371 U.S. 846 (1962).

The petitioners' reliance on a single case, United States v. Jefferson County, 720 F.2d 1511 (11th Cir. 1983), is plainly insufficient to support their position where the vast weight of circuit authority contradicts it. Even in Jefferson County, however, the Eleventh Circuit noted that:

> There are . . . limitations on the extent to which a nonparty can undermine a prior judgment. A nonparty may not reopen the case and relitigate the merits anew; neither may he destroy the validity of the judgment between the parties. 720 F.2d at 1518.

While that court appeared to reject the "impermissible collateral attack" position assumed by all other circuits, its dicta carried little impact. Since the Eleventh Circuit affirmed the district court's denial of intervention to the Jefferson County plaintiffs, its comments on collateral attack were not dispositive

in any substantive manner.

By contrast, the other circuit courts have applied the general rule that final judgments are not open to collateral attack by third parties to consent decrees as well. The impermissibility of such attacks has been addressed by a number of courts. A consent decree, the Sixth Circuit noted, "although founded on an agreement of the parties, is a final judgment." Vanguards, supra at 484, citing Williams v. Vukovich, 720 F.2d 909, 920 (6th Cir. 1983).

Allowing later collateral attack by disappointed third parties adversely affected by a decree would undermine an employer's motivation to settle discrimination cases, and would reopen old claims every time a new group of victims was made whole. Equal Employment

Opportunity Commission v. McCall Printing Corporation, 633 F.2d 1232 (6th Cir. 1980). Absent bad faith, that court noted, a "conciliation agreement and consent decree cannot form the basis of a valid Title VII action" by non-minorities. 633 F.2d at 1237. Other circuit courts are in accord with this reasoning. Dennison v. City of Los Angeles Department of Water and Power, 658 F.2d 694, 695 (9th Cir. 1981) (nonminority collateral attack on affirmative action consent decree impermissible); Grann v. City of Madison, 738 F.2d 786, 796 (7th Cir. 1984) (white employees cannot maintain action challenging state agency's affirmative action order, just as there can be no collateral attack on a consent decree). See also Freeze v. ARO, Inc., 503 F. Supp. 1045 (E.D. Tenn. 1980)

(consent decree settling claims of black employees cannot be basis for collateral Title VII suit by whites).

Consistently, the Fifth Circuit has noted that to permit a collateral attack "would clearly violate the policy under Title VII to promote settlement." Thaggard v. City of Jackson, 687 F.2d 66, 69 (5th Cir. 1982) (affirmative action consent decree not subject to collateral attack); United States v. Kellum, 523 F.2d 1284, 1287 (5th Cir. 1975); Oatis v. Crown Zellerbach Corporation, 398 F.2d 496, 498 (5th Cir. 1968); Hefner v. New Orleans Public Service, Inc., 605 F.2d 893, 898 (5th Cir. 1979) (attack on consent decree would severely undercut important notions of judicial efficiency and finality of judgment); see also Austin v. Dekalb County, Department of Public Safety, 572 F. Supp. 479 (D.C. Ga.

1983) (consent decree not subject to collateral attack). It "would also result in continued uncertainty for all parties involved and render the concept of final judgments meaningless." Thaggard, supra; Prate v. Freedman, 430 F. Supp. 1373, 1375 (W.D. N.Y. 1977), aff'd without opinion, 573 F.2d 1294 (2nd Cir. 1977), cert. denied, 436 U.S. 922 (1978).

In an action procedurally similar to the present case, the Third Circuit affirmed the dismissal of a separate action challenging the terms of consent decrees entered in settlement of a suit, as an impermissible collateral attack on the decrees themselves. National Wildlife Federation v. Gorsuch, 744 F.2d 963 (3rd Cir. 1984). Where parties had an adequate opportunity to intervene

previously, they were precluded from relitigating the same issue by a separate action. 744 F.2d at 971-972. By an earlier decision of that circuit, Society Hill Civic Association v. Harris, 632 F.2d 1045 (3rd Cir. 1980), property owners were also barred from challenging by separate action a consent decree which adversely affected them, even though they did not seek to join an unsuccessful intervention motion with other property owners before the decree was signed. Both National Wildlife and Society Hill are instructive in the present case, since the petitioners here had a prior opportunity to join the unions' intervention request in Culbreath v. Dukakis

more than five years ago.[6/]

6/ Consistent with the decisions of those circuits, the First Circuit had observed on an earlier occasion in Culbreath v. Dukakis, 630 F.2d 15 (1980), that:

> Collateral attack on the decree will be impossible because only the district court supervising implementation of the decree will have subject matter jurisdiction to modify the decree. 630 F.2d at 22 (citations omitted).

Since the present petitioners had an opportunity to engage in that earlier litigation, they were also collaterally estopped from bringing their separate action challenging the provisions of the Culbreath decree.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be held by this Court pending its decisions in Vanguards, Wygant, and Local 638.

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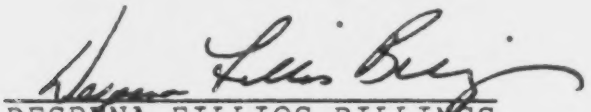

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In the Supreme Court of the United States

OCTOBER TERM, 1985

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v.

WILLIAM J. GEARY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the "collateral attack" doctrine applied by the courts below is consistent with the Due Process Clause.

2. Whether a consent judgment in an action brought under Title VII of the Civil Rights Act of 1964 is subject to the remedial limitations contained in Section 706(g) of Title VII, 42 U.S.C. 2000e-5(g).

3. Whether the use of racial quotas in awarding promotions is a permissible remedy under Section 706(g) of Title VII, as interpreted by this Court in *Firefighters Local Union No. 1784* v. *Stotts*, No. 82-206 (June 12, 1984).

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits, inter alia, racial discrimination in employment. Under Section 706(f)(1) of the Act, 42 U.S.C. 2000e-5(f)(1), the Attorney General is responsible for the enforcement of Title VII in cases such as this one in which the employer is a government, governmental agency, or political subdivision.

This case raises fundamental due process questions regarding the effect of a Title VII consent decree on the right of persons who are not parties to the decree to have their claims of unlawful employment discrimination heard on the merits in federal court. Additionally, the decision below rests in large part on the court of appeals' determination that this Court's decision in *Firefighters Local Union No. 1784* v. *Stotts*, No. 82-206 (June 12, 1984), permits the entry of a consent decree, such as that at issue

here, that prescribes the use of racial quotas in making promotions. This Court's resolution of these issues will have a substantial effect on the Attorney General's enforcement responsibilities under Title VII.[1]

STATEMENT

1. In 1974, minority employees of the Commonwealth of Massachusetts filed an action against state officials challenging as racially discriminatory the hiring and promotion practices of several state agencies, including the Metropolitan District Commission (MDC) police force (Pet. App. 4a, 18a). After two years of negotiations, the parties submitted to the district court a stipulation of facts and a proposed consent decree. The stipulation represented that the facts described therein were "sufficient to sustain an action under Title VII of the Civil Rights Act of 1964 * * * " (*id.* at 4a). The consent decree required the affected state agencies, including the MDC, to establish a special minority eligibility list for each job category covered by the decree and to select applicants from that list, rather than from the usual civil service eligibility list, when necessary to meet or maintain the decree's "annual minority hiring objective" for the agency and job category (*id.* at 5a, 19a).

After learning of the proposed decree, four employee unions moved to intervene (*id.* at 5a).[2] The district court held a hearing on the entry of the consent decree and the motions to intervene. In August 1979, the court denied the motions to intervene as untimely and entered the stipulation of facts and the consent decree (*ibid.*).

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[1] The United States participated as amicus curiae in this case in the court of appeals.

[2] *I.e.*, the Massachusetts Organization of State Engineers and Scientists; Locals 285 and 509, Service Employees International Union, AFL-CIO; the Massachusetts Law Enforcement Council; and the National Association of Government Employees.

The denial of the motions to intervene as untimely was affirmed on appeal. *Culbreath* v. *Dukakis*, 630 F.2d 15 (1st Cir. 1980). After adopting (*id.* at 20) the four-pronged test of *Stallworth* v. *Monsanto Co.*, 558 F.2d 257 (5th Cir. 1977), for determining the timeliness of a petition for intervention,[3] the court of appeals candidly acknowledged (*id.* at 22): "We see little prejudice to the parties caused by the failure of the unions to intervene more promptly." The court felt (*ibid.*), however, that intervention by the unions at any point might cause "real prejudice" by "destroy[ing] the consent decree and forc[ing] a trial on the merits." The court stated (*ibid.*) that affirming the denial of intervention would mean that "the unions and their members may be forever foreclosed from challenging the goal mechanisms of the decree" due to the collateral attack rule, but the court concluded (*id.* at 23) that the unions and their members would not be prejudiced because the court considered their "probability of success on the merits" to be "slight." In a separate opinion, Judge Aldrich questioned (*id.* at 25) how the court was "able to determine the merits of [the unions'] case when they ha[d] not been allowed to present it."

2. As a result of a competitive examination held in April 1983, an eligibility list was established for the position of police captain in the MDC (Pet. App. 18a). On July 6, 1984, Donald E. Callender, a black police officer, was appointed to a provisional police captain position in the MDC, even though his score on the examination was lower than those of petitioners, who are five white MDC police officers (*id.* at 6a, 18a). Callender was appointed

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[3] *Stallworth* identified four factors to be considered in determining the propriety of permitting intervention: (1) the length of time the would-be intervenor knew or reasonably should have known of his interest before petitioning to intervene; (2) the prejudice to existing parties if intervention is granted; (3) the prejudice to the would-be intervenor if intervention is denied; and (4) the existence of unusual circumstances militating either for or against intervention (558 F.2d at 264-266).

in an effort to comply with the minority employment objectives established by the *Culbreath* consent decree (*ibid.*).

On July 16, 1984, petitioners filed the instant case against MDC officials. Petitioners alleged in their complaint that, although they all scored higher than Callender on the April 1983 competitive examination, they were denied the opportunity to be considered for the position of temporary police captain because of their race. They claimed that, but for their race, one of them would have been selected for the provisional captain position rather than Callender, and that Callender's selection therefore deprived them of rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. 1981 (Pet. App. 6a, 19a). The defendants moved to dismiss. Likewise, the plaintiff class in the *Culbreath* litigation filed motions to intervene as a defendant and to dismiss the case (*id.* at 6a, 19a-20a).

3. In November 1984, the district court granted the motion to intervene of the *Culbreath* plaintiff class and the motions to dismiss (*id.* at 16a-29a).[4] The district court found that petitioners' suit was "in essence an attack on the *Culbreath* consent decree" and therefore treated their action as "attempt to intervene in that case" (*id.* at 20a, 21a). In determining whether to permit such intervention, the court applied the factors adopted by the court of appeals, in *Culbreath* v. *Dukakis, supra.* The district court found that, but for this Court's decision in *Firefighters Local Union No. 1784* v. *Stotts*, No. 82-206 (June 12, 1984), the situation was the same as when it denied the prior petitions to intervene in 1980 (Pet App. 21a). It ruled that, absent *Stotts*, the governing factors required it to deny intervention and dismiss the case (*id.* at 21a-24a).

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[4] The court granted the motion of the *Culbreath* plaintiff class to intervene, "because the Class may wish to participate in any appellate review of this order" (*id.* at 29a).

The court then turned to the question whether *Stotts* changed Title VII law to such an extent that, under the fourth factor (see page 3 note 3, *supra*), it constituted an "unusual circumstance" militating in factor of intervention. In *Stotts*, this Court invalidated an injunction prohibiting the Memphis Fire Department from following its seniority system in determining who would be laid off and demoted, insofar as application of that system would decrease the proportion of black employees in certain ranks. The district court rejected petitioners' contention that *Stotts* invalidated the promotion quotas in the *Culbreath* consent decree (Pet. App. at 25a-28a). Finding that petitioners "seek too broad a rule from too narrow a set of facts," the court "decline[d] to read such an expansive meaning into an opinion limited to a discussion of layoffs made in violation of a bona fide seniority system" (*id.* at 28a).

4. The court of appeals affirmed (Pet. App. 1a-15a). Without elaboration, the court of appeals agreed with the district court that petitioners' complaint should be treated as a motion to intervene in *Culbreath*, since, if regarded as a separate action, it would constitute "an impermissible collateral attack on the *Culbreath* consent decree" (*id.* at 6a-7a). The court also agreed with the district court's ruling that *Stotts* did not affect the validity of the promotional goals in the *Culbreath* decree and accordingly did not constitute an "unusual circumstance" justifying intervention (*id.* at 7a).

The court of appeals distinguished *Stotts* on three grounds. First, the court stated, *Stotts* involved a district court's power to order retroactive relief not provided for in a consent decree over the objection of one of the parties to the decree, whereas petitioners in the present case challenged provisions in the consent decree to which the original parties had voluntarily agreed. Second, the court observed that the relief ordered by the district court in *Stotts* was in direct conflict with a bona fide seniority

system protected by Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h), but that petitioners in this case did not claim a conflict between a seniority plan and the remedies in the consent decree. Third, the court stated that "the parties to the *Stotts* decree had expressly disclaimed that the violations alleged in the complaint existed, whereas in this case the parties stipulated that discriminatory patterns and practices existed that were sufficient to support a Title VII action" (Pet. App. at 12a).

The court cited a number of decisions of federal courts in support of its narrow interpretation of *Stotts* (Pet. App.at 12a-13a).[5] The court acknowledged, however, that "this is a difficult and sensitive area in which we and the other circuit courts could be mistaken in our reading of current precedent" (*id.* at 15a).

DISCUSSION

The first question presented by this case—*i.e.*, whether the "collateral attack" doctrine as applied by the courts below is consistent with due process—is an important and recurring question on which the circuits are in conflict. This doctrine, when coupled with holdings regarding timeliness of intervention, has frequently been applied to

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[5] *EEOC* v. *Local 638*, 753 F.2d 1172, 1186 (2d Cir. 1985), cert. granted, No. 84-1656 (Oct. 7, 1985); *Kromnick* v. *School District*, 739 F.2d 894, 911 (3d Cir. 1984), cert. denied, No. 84-606 (Jan. 7, 1985); *Wygant* v. *Jackson Board of Education*, 746 F.2d 1152, 1157-1158 (6th Cir. 1984), cert. granted, No. 84-1340 (Apr. 15, 1985); *Van Aker* v. *Young*, 750 F.2d 43, 45 (6th Cir. 1984); *Vanguards of Cleveland* v. *City of Cleveland*, 753 F.2d 479, 486 (6th Cir. 1985), cert. granted, No. 84-1999 (Oct. 7, 1985); *Grann* v. *City of Madison*, 738 F.2d 786, 795 n.5 (7th Cir. 1984) (dicta), cert. denied, No. 84-304 (Oct. 15, 1984); *Diaz* v. *AT&T*, 752 F.2d 1356, 1360 n.5 (9th Cir. 1985) (dicta); *Turner* v. *Orr*, 759 F.2d 817, 823-826 (11th Cir. 1985), petition for cert. pending, No. 85-177; *Hammon* v. *Barry*, 606 F. Supp. 1082, 1095 (D.D.C. 1985); *NAACP* v. *Detroit Police Officers Association*, 591 F. Supp. 1194, 1202-1203 (E.D. Mich. 1984) (dicta).

deny would-be plaintiffs, such as petitioners here, any opportunity to be heard on the merits of their discrimination claims. Unless corrected, this doctrine will have a major, continuing impact.

The collateral attack doctrine was initially embraced by several circuits without full examination of the alternatives or of the rule's devastating impact on the ability of nonparties to protect their legitimate rights. As understanding of the competing concerns has grown, the courts have increasingly questioned the doctrine. In our view, the issue is now ripe for and fully warrants this Court's review.

This case presents two additional questions that also merit plenary review by this Court, *i.e.*, whether a consent decree in a Title VII action is subject to the limitations of Section 706(g) of Title VII, 42 U.S.C. 2000e-5(g), and whether the use of racial quotas in awarding promotions is a permissible remedy under Section 706(g), as interpreted by this Court in *Stotts*.[6] The Court, however, has recently granted certiorari to review these questions in *Local 28, Sheet Metal Workers' Association* v. *EEOC*, cert. granted, No. 84-1656, (Oct. 7, 1985), and *Local No. 93, International Association of Firefighters* v. *City of Cleveland*, cert. granted, No. 84-1999, (Oct. 7, 1985). The Court's decisions in these cases may well be dispositive of these issues.

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[6] Petitioners suggest that a fourth question is also presented. *i.e.*, whether, in Title VII cases against public employers, such quotas violate the Equal Protection Clause of the Fourteenth Amendment. In denying intervention on timeliness grounds, however, the courts below did not address this question. Rather, intervention was denied as untimely solely because, in the lower courts' view, this Court's decision in *Stotts* did not invalidate the *Culbreath* promotion quotas and hence was not a recent change in decisional law weighing in favor of intervention. For this reason, the constitutional question proffered by petitioners is not properly before the Court at this stage of the proceedings.

Should the Court grant certiorari to review the validity of the collateral attack doctrine, it can dispose of the other issues on the basis of its decision in *Local 28* and *Local No. 93*. If the Court determines not to address the collateral attack doctrine at this time, it should hold the petition pending disposition of these two cases.

1. In accordance with the provisions of a 1979 Title VII consent decree, petitioners were passed over for promotion solely because of race. Ten days later, they sued their employer for illegal discrimination, but the district court and the court of appeals held that petitioners' claims were not entitled to be heard. The lower courts viewed their suit as "an impermissible collateral attack" on the consent decree (Pet. App. 6a-7a)—a decree into which neither petitioners nor any party representing them had entered. Because of their adherence to the collateral attack doctrine, the lower courts treated petitioners' suit as an attempt to intervene in the litigation that had resulted in the consent decree, and the courts concluded that this attempted intervention came too late. According to the lower courts, petitioners should have tried to intervene before the decree was entered—at a time when any harm to petitioners resulting from the decree would have been highly speculative. In our view, petitioners were denied elementary due process.

a. In recent years, several circuits and district courts, like the courts below in this case, have held that a nonparty to a consent decree may not attack action taken pursuant to the decree in a "collateral" (*i.e.*, independent) suit.[7] This doctrine has never been adopted or endorsed by this Court, and it has come under increasing attack, both

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[7] See, *e.g.*, *Thaggard* v. *City of Jackson*, 687 F.2d 66, 68-69 (5th Cir. 1982), cert. denied, 464 U.S. 900 (1983); *Dennison* v. *City of Los Angeles*, 658 F.2d 694, 695 (9th Cir. 1981); *Black & White Children* v. *School District*, 464 F.2d 1030, 1030-1031 (6th Cir. 1972) (per curiam); *Burns* v. *Board of School Commissioners*, 437 F.2d 1143,

in this Court and in the lower courts, as well as from legal scholars.[8] Indeed, the only Justices to address the issue, Justices Rehnquist and Brennan, have rejected the doctrine in circumstances analogous to those of the instant case. *Ashley* v. *City of Jackson,* 464 U.S. 900 (1983) (Rehnquist, J., joined by Brennan, J., dissenting from denial of certiorari). In *Ashley,* suits were brought by white plaintiffs challenging certain hiring and promotional decisions as racially discriminatory. Finding that the challenged decisions were the result of consent decrees entered in prior cases, the district court dismissed the suits as impermissible collateral attacks. The Fifth Circuit affirmed. *Thaggard* v. *City of Jackson,* 687 F.2d 66, 68-69 (1982).

In dissenting from the denial of certiorari, Justices Rehnquist and Brennan concluded that the court of appeals had "erred in holding that a district court cannot entertain a suit challenging practices allegedly mandated or permitted by a prior consent decree * * *" (*City of Jackson*, 464 U.S. at 900). Noting that plaintiffs' "cause of action did not even accrue until at least a year after the entry of the consent decrees" (*id.* at 902), the Justices found dismissal of the claim to be inconsistent with the fundamental principle that " '[i]t is a violation of due process for a judgment to be binding on a litigant who was not a

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1144 (7th Cir. 1971) (per curiam); *Prate* v. *Freedman,* 430 F. Supp. 1373, 1374-1375 (W.D. N.Y.), aff'd, 573 F.2d 1294 (2d Cir. 1977) (Table), cert. denied, 436 U.S. 922 (1978); *O'Burn* v. *Shapp,* 70 F.R.D. 549, 552-553 (E.D. Pa.), aff'd, 546 F.2d 418 (3d Cir. 1976)(Table), cert. denied, 430 U.S. 968 (1977); *Austin* v. *County of Dekalb,* 572 F. Supp. 479 (N.D. Ga. 1983).

[8] See, *e.g.*, 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4458, at 117-118 n.38 (1985 Supp.) (criticizing the Fifth Circuit's application of the collateral attack doctrine in *Thaggard*). See also Swarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform,* 1984 Duke L.J. 887, 922.

party nor a privy and therefore has never had an opportunity to be heard' " (*ibid.*, quoting *Parklane Hosiery Co.* v. *Shore,* 439 U.S. 322, 327 n.7 (1979)). This principle, the Justices noted, is rooted in our " 'historic tradition that everyone should have his day in court.' " *Ibid.*

The Justices found this principle fully applicable to a judgment entered by consent, for while a consent decree binds the signatories, it "cannot be used as a shield against all future suits by nonparties seeking to challenge conduct that may or may not be governed by the decree" (464 U.S. at 902). The Justices could find "no justification, either in general principles of preclusion or in the particular policies implicated in Title VII suits, for the District Court's refusal to take jurisdiction over th[e] case" (*id.* at 904).[9]

For largely these reasons, the Eleventh Circuit recently rejected the collateral attack doctrine. In *United States* v. *Jefferson County,* 720 F.2d 1511 (1983), the court affirmed an order denying a request by a union and nonminority employees to intervene in pending lawsuits to challenge proposed consent decrees containing "affirmative action remedies in hiring and promotion" (*id.* at 1515). The Eleventh Circuit reasoned that the denial of intervention would cause "no prejudice" to the rights of the

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[9] Following the denial of review in *Ashley,* the Fifth Circuit expressed serious qualms about the collateral attack doctrine. The petitioners in *Ashley,* in addition to initiating independent suits, also attempted to intervene in the consent decree suits. In affirming the denial of intervention as untimely, the Fifth Circuit stated (*Corley* v. *Jackson Police Dep't,* 755 F.2d 1207, 1210 (1985)): "We are constrained to note that if the foregoing well-settled intervention rules in combination with the rule of *Thaggard* v. *City of Jackson,* to which we are firmly bound here, unjustly deny a party his day in court, then the appropriate remedy lies in reexamination of the *Thaggard* doctrine in the appropriate forum, particularly in light of the persuasive opinion of Justice Rehnquist, joined in by Justice Brennan, dissenting from the denial of certiorari in *Thaggard.*"

putative intervenors (*id.* at 1519) because, as nonparties, they would not be bound by the decree and could challenge actions taken pursuant to it in subsequent litigation (*id.* at 1517-1519). The court wrote (*id.* at 1518 (footnote omitted)):

> [S]ome courts have raised a specter that any action having a burden, financial or otherwise, on a consent decree is an "impermissible collateral attack" on the decree. We do not follow this path to the extent that it deprives a nonparty to the decree of his day in court to assert the violation of his civil rights.

See also *Reeves* v. *Wilkes*, 754 F.2d 965, 971-972 (11th Cir. 1985).

We agree with the Eleventh Circuit and Justices Rehnquist and Brennan that the collateral attack doctrine cannot be squared with fundamental principles of due process.

b. Because of its belief that the collateral attack doctrine precluded petitioners from maintaining an independent suit, the district court in this case treated petitioners' suit as a motion to intervene in the original suit. Had the court allowed intervention, the harm caused by the collateral attack doctrine might have been cured.[10] Instead, however, the court held that an attempt to intervene was untimely. The district court measured the timeliness of petitioners' attempted intervention from the dates on which the complaint and consent decree were filed in the original suit (Pet. App. 21a-22a), and the court of appeals concurred in this analysis (*id.* at 7a). Likewise, other courts of appeals, in denying intervention in analogous circumstances, have frequently measured timeliness of intervention from the filing of complaints or consent decrees, rather than from the date on which the would-be intervenor's cause of action

[10] However, petitioners might still have been prejudiced if the standard for relief (see, *e.g.*, Fed. R. Civ. P. 60(b)) was more demanding than that in an independent action.

allegedly accrued. See, *e.g.*, *Pennsylvania* v. *Rizzo*, 530 F.2d 501, 506-507 (3d Cir.), cert. denied, 426 U.S. 921 (1976); *Corley* v. *Jackson Police Dep't*, 755 F.2d 1207, 1209-1210 (5th Cir. 1985). See also *Culbreath* v. *Dukakis*, 630 F.2d at 20-21.

When coupled with the collateral attack doctrine, these holdings form a kind of jurisdictional pincers movement that often denies would-be plaintiffs/intervenors any opportunity to be heard—the quintessence of a denial of due process. *E.g.*, *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940); *General Foods* v. *Massachusetts Dep't of Public Health*, 648 F.2d 784, 787 (1st Cir. 1981). In our view, if petitioners were barred from maintaining an independent action by virtue of the collateral attack doctrine, due process requires that the timeliness of an attempt to intervene in the original suit must be measured from the time at which petitioners' interests were actually affected or were certain to be affected by implementation of the decree—that is, when their cause of action accrued.

Any other rule would extinguish rights before the injured party knows what has happened. Under the lower courts' holding, which apparently requires individual employees to seek intervention shortly after the initial complaint is filed, an incumbent employee is required to see into the future, to speculate on what his interests are likely to be, and to assess whether any of the likely outcomes of the ongoing litigation will adversely affect those speculative interests. If he concludes that the litigation may adversely affect those speculative interests, he must retain counsel and seek to intervene in the case to litigate his claim, even though the claim at that point has not yet accrued (and may never accrue) and is probably so speculative that he lacks standing to raise it. It is unreasonable to require individual employees to engage in such speculative litigation. Moreover, those adversely affected by a consent decree, which may remain in effect for

a decade or more, may include not only current employees but persons who have not even applied for employment or been hired when the decree is proposed and entered. Obviously such individuals are in no position to intervene at that time.

c. The principal reasons why the "collateral attack" doctrine was originally adopted by some lower courts in discrimination cases were respect for the finality of judgments and fear that conflicting judgments might result if a suit challenging the original decree were entertained. See, e.g., *Thaggard* v. *City of Jackson,* 687 F.2d at 68; *Dennison* v. *City of Los Angeles* 658 F.2d at 695; *O'Burn* v. *Shapp,* 70 F.R.D. 549 (E.D. Pa.), aff'd, 546 F.2d 417 (3d Cir. 1976) (Table), cert. denied, 430 U.S. 968 (1977). These are valid concerns, but the feared consequences can be prevented by far less drastic means.

The collateral attack doctrine is not needed to prevent conflicting decrees, because any subsequent action challenging the original decree can and generally should be transferred to the court that adjudicated the original case. See 28 U.S.C. 1404(a); Restatement (Second) of Judgments § 79 comment d (1982). In the present case, of course, even this was not necessary because both suits were brought in the same court.

The finality of judgments may be furthered by making unions and nonminority employees parties in the original litigation. In this case, however, both the original plaintiffs and the original defendants actively and successfully labored to prevent the unions and nonminority employees from achieving party status. First, the original plaintiffs successfully opposed joinder of nonminority employees.[11] *Jackson* v. *Sargent,* 394 F. Supp. 162 (D. Mass. 1975).

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[11] On the question whether a union should be regarded as an indispensable party under Fed. R. Civ. P. 19 in a discrimination suit that may have an adverse effect upon its members, see 7 C. Wright & A. Miller, *Federal Practice and Procedure* § 1620, at 202-204 (1972).

Second, both the original plaintiffs and the original defendants successfully resisted efforts by the unions to intervene prior to entry of the consent decree for the purpose of protecting the rights of their members. *Culbreath* v. *Dukakis, supra.* The upshot of this strategy, which was approved by the lower courts, was that the unions and nonminority employees remained nonparties and thus were not bound by the consent decree. Having intentionally achieved this result, neither the original parties nor the lower courts were in any position to complain when petitioners, making use of their rights as nonparties, brought suit challenging actions taken under the consent decree.

d. In sum, the collateral attack doctrine, coupled with the timeliness-of-intervention rule applied by the courts below, denied petitioners rudimentary due process—the right to be heard at some appropriate time on the merits of their discrimination claims. Because this doctrine has gained considerable acceptance among the lower courts, because the circuits are divided regarding its validity, and because of its devastating effect on individuals claiming discrimination, review by this Court is warranted.

2. The second and third questions presented in the petition concern this Court's decision in *Stotts.* In concluding that petitioners should not be allowed to intervene in the original lawsuit, the lower courts rejected the argument that this Court's decision in *Stotts* "so changed the law of Title VII that it constituted 'an unusual circumstance' militating for intervention" under the court of appeals' governing precedent (Pet. App. 7a (footnote omitted)). The district court held that "*Stotts* is simply inapplicable to this case" (*id.* at 29a), and the court of appeals concurred (*id.* at 6a), while nevertheless confessing that it "could be mistaken" (*id.* at 15a).

In our view, the courts below were indeed "mistaken" in concluding that *Stotts* did not affect the promotion quotas at issue in this case. For the reasons set out in our briefs in

support of the petitions for certiorari in *Local 28, Sheet Metal Workers' International Association* v. *EEOC, supra,* and *Local No. 93, International Association of Firefighters* v. *City of Cleveland, supra,* we believe that Section 706(g) applies to Title VII consent decrees and, as this Court stated in *Stotts,* prohibits racially preferential relief to persons who are not victims of the employer's discrimination. In addition, as those briefs make clear, we believe that the courts below erred in interpreting *Stotts* as invalidating only those racial quotas that impinge upon bona fide seniority systems.[12]

This Court's decisions in *Local 28* and *Local No. 93* are likely to be dispositive of the second and third questions presented in this case. Should the Court grant certiorari to consider the collateral attack issue presented here, it can dispose of the other issues on the basis of its decisions in *Local 28* and *Local No. 93.* Should the Court elect not to address the collateral attack issue at this time, it should hold the present case pending its decisions in these two cases, since a decision by this Court regarding the effect of *Stotts* on racial quota remedies in Title VII cases will have a direct bearing on the question whether petitioners should have been denied intervention on timeliness grounds.

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[12] *Local No. 93* presents the question whether a district court may enter a consent judgment that bestows promotional preferences based upon race on persons who are not proven victims of discrimination. *Local 28* presents the question whether as a remedy in a Title VII action, or as a civil contempt remedy for violation of a Title VII judgment, a court may award preferences based solely upon race or ethnic background, rather than on the beneficiary's status as an actual victim of discrimination. We are serving copies of our briefs in *Local 28* and *Local No. 93* upon the parties in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Alternatively, the Court may wish to hold the petition pending disposition of *Local 28* and *Local No. 93, supra.*

Respectfully submitted.

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Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

CHARLES J. COOPER
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SAMUEL A. ALITO, JR.
Assistant to the Solicitor General

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Attorneys

OCTOBER 1985

No. 85-492

Supreme Court, U.S.
FILED
JAN 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

ROBERT T. DEVERAUX, WILLIAM E. KELLEY, JOHN BAKEY, DONALD J. DENTREMOT and DANIEL J. GATELY,

Petitioners,

against

WILLIAM J. GEARY and THOMAS E. KEOGH,

Respondents,

and

PLAINTIFF-CLASS in CULBREATH v. DUKAKIS,

Intervenors-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Motion to Enlarge Time to File Brief for Phil Caruso as *Amicus Curiae*

LAW OFFICES OF RICHARD HARTMAN
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985.

No. 85-492

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PLAINTIFF-CLASS in CULBREATH v. DUKAKIS,

Intervenors-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Motion to Enlarge Time to File Brief for Phil Caruso as *Amicus Curiae.*

PHIL CARUSO, by his attorney and counsel, Richard Hartman, hereby respectfully moves this Court to enlarge the time to file the accompanying Brief in this case as *amicus curiae*.

The applicant now moves for an enlargement of time and requests that the Court accept the Brief pursuant to such enlargement. It is understood by the undersigned that the Rules of the Court make no provision for such an application as is presently made. However, the reasons stated in the body of the Brief, in the portion entitled Interest of Phil Caruso, in our opinion, set forth a sufficient reason for the Court to grant the present application, irregular though it may be.

The stature of Phil Caruso as a public sector union leader and a police union leader, together with his unique background render him to be an appropriate representative spokesman for all police officers, precisely the class of persons directly affected by the law suit in *Deveraux v. Geary*. Therefore, the section of the *amicus curiae* Brief entitled Interest of Phil Caruso is requested to be deemed to be incorporated into this motion at this point as if set forth in its entirety.

On or about January 25, 1986, the undersigned attempted to file an *amicus curiae* Brief on behalf of Phil Caruso. However, by letter dated January 30, 1986, the Chief Deputy Clerk of the Court rejected the filing as being out-of-time pursuant to Rule 36 of the Rules of the Court. Apparently, the time to file an *amicus curiae* Brief in this case expired on October 23, 1985. Said letter, dated January 25, 1986 is hereby attached.

For the foregoing reasons, it is respectfully requested that the Court grant the within motion to enlarge the time to file the accompanying Brief in this case as *amicus curiae,* and that ultimately, the Court grant the Petitioners' petition for Writ of Certiorari.

Respectfully submitted,

RICHARD HARTMAN
Attorney for Phil Caruso

Exhibit A.

OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

WASHINGTON, D. C. 20543

January 30, 1986

Richard Hartman, Esquire
252-00 Horace Harding Expressway
Little Neck, New York 11362

Re: Robert T. Devereaux, *et al.* v. William J. Geary, *et al.*, No. 85-492

Dear Mr. Hartman:

Your brief for Phil Caruso as *amicus curiae* was received January 25, 1986, and is returned as out-of-time pursuant to Rule 36 of the Rules of the Court. The time to file such a brief expired on or about October 23, 1985, when the time for respondents to file briefs expired.

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk
By FRANCIS J. LORSON
Chief Deputy Clerk

FJL/dee
Enclosure
cc: Hon. Charles Fried, Solicitor General
Herman J. Smith, Jr., Esq.
Gabriel O. Dumont, Jr., Esq.
Despena F. Billings, Esq.
James H. Wexler, Esq.
Ilene Seidman, Esq.

Supreme Court, U.S.
FILED
JAN 25 1988
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CLERK

No. 85-492

IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief for Phil Caruso as *Amicus Curiae* Interest of Phil Caruso

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RICHARD HARTMAN
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Question Presented.

1. Whether the use of racial quotas in awarding promotions is a permissible remedy under Section 706(g) of Title VII, as interpreted by this Court in *Firefighters Local Union No. 1784 v. Stotts*, No. 82-206 (June 12, 1984).

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985.

No. 85-492

ROBERT T. DEVERAUX, WILLIAM E. KELLEY, JOHN BAKEY, DONALD J. DENTREMOT and DANIEL J. GATELY,

Petitioners,

against

WILLIAM J. GEARY and THOMAS E. KEOGH,

Respondents,

and

PLAINTIFF-CLASS in CULBREATH v. DUKAKIS,

Intervenors-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR PHIL CARUSO AS *AMICUS CURIAE.*

Interest of Phil Caruso.

Phil Caruso, requests that the Court reopen the submission process in the matter of the Petitioners' Writ of Certiorari for the above-encaptioned case and accept for consideration the present Brief submitted in support of the application for the Writ.

Movant is a citizen of the United States of America and the State of New York, residing in the County of Suffolk. He is also a Police Officer in the Police Department of the City of New York for more than 28 years. He is also President of the Patrolmen's Benevolent Association of the City of New York, the duly recognized bargaining agent for members of the New York City Police Department with the rank of Police Officer. As such, the Patrolmen's Benevolent Association of the City of New York is a public sector labor union representing Police Officers in their relations with their municipal employer. However, this brief is filed on movant's behalf in his personal capacity, and not as President of the Patrolmen's Benevolent Association.

As a Police Officer of more than 28 years standing, Phil Caruso has a great sense of pride in his chosen profession. The major portion of his career has been devoted to the representation of police officers in matters relating to pay, working conditions and basic rights. Consequently, there is a more than ample basis set forth for his qualifications to speak to the issues raised in *Deveraux v. Geary* and, specifically, how quota systems impact on police morale.

Given the multitude of socio-economic problems that currently afflict our society, particularly in the great urban centers of the nation, and, given the undeniable fact that

police officers must necessarily become embroiled in the many and varied confrontational situations coaxed forth by societal ills, the need for a well-trained highly motivated and efficient police force has never been greater.

In this connection, society has placed extraordinary demands upon the police in terms of an awesome burden of responsibility and accountability evoked by legal issues that sometimes even strain the profound omniscience of the esteemed justices of this high court. Accordingly, a police service that must function in such a complex social milieu must recruit the best qualified individuals available, and must thereafter promote only those who manifest a driving initiative to advance in rank. Invariably, those who possess a superior intellect and qualities of leadership rise to the top, a natural process that should not be stifled. In this connection, it is submitted that for a police department to dilute established standards of excellence is irresponsible.

The issues raised in *Deveraux v. Geary* are of no mere academic significance to the New York City Police Officers. In New York City, a recent invocation of a minority quota system for promotion to the Civil Service rank of Sergeant has sparked an intra-departmental conflict that has taken on crisis proportions. A Court-imposed quota system has created widespread dissension within the ranks of New York City Police Officers by arousing deep racial antagonisms. It cannot be an exaggeration to state that these antagonisms have pitted police officer against police officer and brother against brother.

Moreover, even those minority members who have been promoted to the rank of sergeant and who did so while

achieving passing marks, have been unduly branded as failures and have been derisively referred to as "quota sergeants." This is so because approximately 200 minority officers were promoted to the rank of sergeant, in spite of the fact that they failed the last Civil Service promotional exam. To that extent, instead of achieving a desired racial balance, the quota system, which has indelibly attached a condemnational stigma to *all* minority promotees, has actually produced a counterproductive result.

Any police department is a quasi-military organization. As with the military, incentive and morale are vital, indispensible elements that serve to promote the accomplishment of the police mission in our society. At the present time, under the upheaval wrought by court-imposed quota systems, incentive and morale on a collective basis have been shattered. On an individual basis, personal initiative, as well as the basic human aspiration to achieve, have also been destroyed. This uncharacteristic atrophy that now hampers the police service cannot by any means be said to serve the public interest.

A decision by this Court in favor of the Petitioners in the instant matter would serve to greatly restore the integrity of the Civil Service merit system, which, despite occasional minor flaws, has served us well. In both theory and practice, the merit system does not obviate the constitutional rights of any individual. The merit system justly rewards the exertion of a dedicated effort to achieve upward mobility. Conversely, quota systems find vivid expression in a form of convoluted logic that rewards failure in the name of affirmative action.

If the rights of all citizens are to be restored, and it is submitted that the Court-imposed quota systems have, in

the past, violated the rights of many citizens, and if fairness and objectivity are to be resurrected within the instrumentalities of government, and if government is to provide efficient professional services, as is its legal and moral obligation to the people which it serves, then this Court must strike down the irresponsible imposition of quota systems by granting the instant application by Petitioners for a Writ of Certiorari.

Statement.

1. In 1974, certain minority employees brought a suit against their employer, the Metropolitan District Commission, a state agency of Massachusetts, seeking to remedy what they believe to be radically discriminatory hiring and promotion practices occurring within several governmental agencies within that state. In due course, the appropriate representatives of the Commonwealth entered into a stipulation of facts and submitted to the United States District Court for the District of Massachusetts a joint proposal for a Court Order to remedy the claimed transgressions against Plaintiffs and others similarly situated.

According to the stipulation, the facts contained there were considered to be sufficient to state a cause of action by Plaintiffs within the parameters of Title VII of the Civil Rights Act of 1964. The proposed order was to require the state agencies concerned to establish a special minority eligibility list for each job category covered and to select applicants from the list when necessary to meet or maintain the "annual minority hiring objective" for each agency and job category. In short, a quota system to hire and promote minority members was established.

A hearing was held in District Court as to whether the Court should adopt the proposed order. Several unions of civil servants in the Boston area moved to intervene in opposition to the Court adopting the proposed order. In 1979, the District Court of Massachusetts denied the Motions to Intervene by the unions, on the grounds of being untimely. At the same time, the Court adopted the stipulation of facts and the order. The entered order was styled a consent decree. The unions duly appealed. The Court of Appeals affirmed the denial of the Motions to Intervene in *Culbreath v. Dukakis*, 630 F.2d 15 (1st Cir. 1980).

In its decision, the Court of Appeals stated that the reason for their affirmance of the District Court was despite the circumstance that the original parties could point to scant prejudice by the supposedly late intervention of the unions. The Court of Appeal stated, however, that the motivating factor for its decision was a concern that allowing the unions to intervene might cause "real prejudice," in that intervention might overturn the consent decree and cause a trial to be had on the issue.

2. In April, 1983, an eligibility list was established for the position of captain of police in the police force of the Metropolitan District Commission. After the two persons with the highest marks were promoted to captain, a black police officer, Donald E. Callender, was appointed captain on July 6, 1984, despite the fact that his examination score was lower than that of the five petitioners in the present case. The stated reason for the appointment was an effort to comply with the quota system for minorities established in *Culbreath*.

Ten days later, on July 16, 1984, the five petitioners filed the present case against their governmental

employers. In their suit, Petitioners alleged that they were the victims of reverse discrimination and that the promotion of Donald Callender deprived them of rights guaranteed by the Fourteenth Amendment and 42 U.S.C. 1981. Petitioners relied upon a case of this Court, *Firefighters Local Union No. 1784 v. Stotts,* 104 S.Ct. 2576 (1984).

The plaintiff-class in *Culbreath* made an application to intervene as a defendant, which was granted. Both the governmental defendant and the *Culbreath* plaintiff-class moved to dismiss the complaint.

3. The District Court granted the Motions to Dismiss. The Court held that the petitioners' suit was an inappropriate attack on the consent decree in *Culbreath,* and the petitioners' suit was construed to be a Motion to Intervene in *Culbreath.* As such, the District Court stated that the matter was governed by the decision of *Culbreath* and that petitioners' suit was out of order on the ground that intervention was untimely. The Court also stated that *Firefighters v. Stotts* was not applicable to the present case.

4. Petitioners duly appealed to the Court of Appeals, First Circuit. There, the District Court's order and reasoning was affirmed. Specifically, the First Circuit agreed that the District Court was correct in treating Petitioners as Intervenors in *Culbreath.*

The Court also agreed with the reasoning of the District Court that *Firefighters v. Stotts* was distinguishable. In general, the Court of Appeals cited with approval the District Court's extremely narrow interpretation of *Stotts.* However, towards the end of its decision, the Court did

acknowledge that the area of law was "difficult and sensitive," and that there was a possibility that the Court was mistaken in its interpretation of existing precedent.

Discussion.

The opinion submitted by the Court of Appeals, First Circuit, it is submitted, contains a virtual invitation for the Court to grant the petition for certiorari. The acknowledgement by the Court that "this is a difficult and sensitive area in which we and other Circuit Courts could be mistaken in our reading of current precedent" (765 F.2d at 275) reflects the concern of the Court of Appeals that the present issue be correctly decided. It is suggested that the Court of Appeals was nervous about affirming the District Court. It might not be too much to state that the Circuit Court would welcome guidance from this Court; so would Petitioners.

The basis for the District Court's decision was the Circuit Court's decision in *Culbreath v. Dukakis,* 630 F.2d 15 (1st Cir. 1980). *Culbreath,* it is submitted, was a flawed decision. Indeed, the decision in *Culbreath* stated that "we see little prejudice to the parties caused by the failure of the unions to intervene more promptly." *Id.* at 22. Moreover, the Circuit Court was more concerned with putting into effect the current consent decree, instead of resolving its defects. See *Id.* The Court readily acknowledged the existence of the defects but refused to take any corrective measures.

This approach was later incorporated into the present case. In order to reach a decision, the District Court followed the four-factor test that was established in *Stallworth v. Monsanto Co.,* 558 F.2d 257, 264 (5th Cir. 1977), and which was used in the *Culbreath* case.

It is submitted that the Petitioners met the first factor of the test; "the length of time the potential intervenors knew or reasonably should have known of their interest before they petitioned to intervene." Petitioners, in the present case, although members of the Metropolitan District Commission, were not aware of their interest until ten days prior to the commencement of this action. While the consent decree was entered into in December, 1978, Petitioners, at that time, were not interested members with a right to intervene. Therefore, Petitioners' interest did not accrue until they were passed over for the promotion.

This Court must remember, as was pointed out in *Firefighters Local Union No. 1784 v. Stotts,* 104 S.Ct. 2576, 2586 (1984), that the non-minority employees, themselves, were not parties to the consent decree when it was entered into. Therefore, the terms of the decree cannot be said to indicate any agreement that they entered into. Without the opportunity for them to agree or disagree with the terms of the consent decree, the Petitioners have been unable to take any corrective measures that might prevent the decree from impeding upon their rights. Therefore, Petitioners have commenced their action within a timely fashion and therefore certiorari should be granted.

The second factor, "the prejudice to existing parties due to the potential intervenor's failure to petition for intervention promptly," it is submitted, will not cause undue prejudice to the existing parties if the Petitioners are allowed to intervene. The First Circuit, itself, stated that "we see little prejudice to the parties caused by the failure of the unions to intervene more promptly." See 630 F.2d at 22. In *Culbreath,* the unions attempted to intervene approximately four years after they received notice of the

suit. By contrast, in the present case, Petitioners commenced the suit only ten days after they were notified that one of their colleagues was to pass over them in promotion, solely on the basis of race. Moreover, by no means were Petitioners parties to the consent decree, nor were they in agreement with that document. Accordingly, the reversal of the Courts below would not unduly prejudice any party.

The third factor, "the prejudice the petitioners would suffer if they were not allowed to intervene," would be an undue burden that would be entirely borne by the Petitioners themselves. Petitioners' rights to intervene did not accrue until they were denied their right to a promotion. While the Metropolitan District Commission stipulated to allegations that in the past it was guilty of discriminatory practices, this stipulation causes no harm to the Metropolitan District Commission, but tremendous prejudice to Petitioners.

The fourth factor, "the existence of some unusual circumstances militating either for or against intervention," is dictated by this Court's decision in *Firefighters v. Stotts, supra.* It is submitted that this Court's decision in the case created an unusual circumstance with respect to the present controversy. Therefore, it is for this Court to grant Petitioners that which the Courts below have declined to do. It is submitted that the *Stotts* decision has created a change under Title VII and therefore dictates that the consent decree at issue here should be modified or extinguished entirely.

The First Circuit, while affirming the District Court's decision, appears to have acknowledged that such a sweeping action might be called for. However, it is suggested

that the Court of Appeals was reluctant to take such a drastic step, when it stated that, "we recognize, of course, that this is a difficult and sensitive area in which we and the other Circuit Courts could be mistaken in our reading of current precedent." *Deveraux,* 765 F.2d at 275.

For this reason, as was pointed out at the outset of this discussion, the Court below appeared to call upon this Court to closely review its decision in this case.

Conclusion.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

RICHARD HARTMAN
Attorney for Phil Caruso

October 1985